DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1327
Title: Lamar Evans, Petitioner
v.
Michigan
Docketed: May 4, 2012
Lower Ct: Supreme Court of Michigan
Case Nos.: (141381)
Decision Date: March 26, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 2 2012	Petition for a writ of certiorari filed. (Response due June 4, 2012)
May 8 2012	Brief of respondent Michigan in opposition filed.
May 16 2012	Reply of petitioner Lamar Evans filed.
May 22 2012	DISTRIBUTED for Conference of June 7, 2012.
Jun 11 2012	Petition GRANTED.
Jun 13 2012	Motion to dispense with printing the joint appendix filed by petitioner Lamar Evans.
Jun 20 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jun 29 2012	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jul 13 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 17, 2012.
Jul 13 2012	The time to file respondent's brief on the merits is extended to and including October 5, 2012.
Jul 23 2012	SET FOR ARGUMENT ON Tuesday, November 6, 2012
Aug 14 2012	Record received from Supreme Court of Michigan. 1 box
Aug 15 2012	Brief of petitioner Lamar Evans filed.
Aug 17 2012	Record received from Court of Appeals of Michigan. (1 envelope)
Aug 22 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Aug 24 2012	CIRCULATED.
Oct 5 2012	Brief of respondent Michigan filed. (Distributed)
Oct 12 2012	Brief amicus curiae of the United States filed. (Distributed)
Oct 12 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 26 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

	and for divided argument GRANTED.
Oct 29 2012	Reply of petitioner Lamar Evans filed. (Distributed)
Nov 6 2012	Argued. For petitioner: David A. Moran, Ann Arbor, Mich. For respondent: Timothy A. Baughman, Detroit, Mich.; and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 11-1327

Supreme Court, U.S.
FILED
MAY 2 - 2012
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LAMAR EVANS,

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Double Jeopardy Clause bar retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that fact?

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REFERENCE TO OPINIONS BELOW

The March 26, 2012, opinion of the Michigan Supreme Court is published as *People v. Evans,* 491 Mich. 1, ___ N.W.2d ___ (2012). The May 13, 2010, opinion of the Michigan Court of Appeals is published as *People v. Evans*, 794 N.W.2d 848 (Mich. Ct. App. 2010). Both of these opinions are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the March 26, 2012, judgment of the Michigan Supreme Court. Because that judgment would force Petitioner to endure a second criminal trial over his Double Jeopardy Clause objection, that decision is final and subject to review now under 28 U.S.C. § 1257. *Smalis v. Pennsylvania*, 476 U.S. 140, 143 n. 4 (1986).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. V (Double Jeopardy Clause):

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

STATEMENT

Petitioner Lamar Evans was charged in 2008 with "burning other real property" in violation of

Mich. Comp. Laws § 750.73. That statute provides in relevant part that the crime of burning other real property is committed by a person who "wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter[.]" The referenced preceding section, Mich. Comp. Laws § 750.72, prohibits wilfully or maliciously burning "any dwelling house, either occupied or unoccupied, or the contents thereof[.]"

Petitioner was tried in February 2009. At the close of the prosecution's proofs, Petitioner moved for a directed verdict of acquittal, arguing that the prosecution had failed to prove that the house he had allegedly burned was not a dwelling house and thereby excluded from the definition of "other real property" in Mich. Comp. Laws § 750.73. App. 63-67. Petitioner's counsel pointed out that the evidence the prosecution introduced at trial established that the burned house "was an occupied dwelling, or that it was capable of being lived in." App. 65.

The trial court reviewed the standard jury instructions, the commentary to those instructions, and the statute itself. App. 68-70. After concluding from that review that the crime with which Petitioner was charged contained an element that the building burned not be a dwelling house,[1] the court orally

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[1] As the Michigan Court of Appeals later observed, the trial judge apparently missed a "use note" in the standard jury

(Continued on following page)

granted the directed verdict motion: "The testimony was this was a dwelling house, paid for for some forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter. Motion granted." App. 71. The trial court confirmed its oral grant of directed verdict with a written order granting "the Motion for Directed Verdict of Acquittal." App. 72.

The prosecution appealed the order to the Michigan Court of Appeals. Over Petitioner's objection that the Double Jeopardy Clause precluded the prosecution's appeal, that court issued a published opinion reversing the trial court's grant of a directed verdict and ordering a new trial. App. 45.

The appellate court first held that the trial judge erred in holding that the statute criminalizing burning other real property required the prosecution to prove that the building was not a dwelling. App. 51-53. The appellate court next rejected Petitioner's argument that, even though the trial judge's construction

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instructions providing that the fourth element, "that the building was not a dwelling house," should only be read to the jury when burning other real property is charged as a lesser included offense of burning a dwelling. App. 52. If the trial judge did see the use note, she may have been confused by the commentary to that instruction, which provided, "[t]his offense is similar to [arson of a dwelling house] except that an essential element is that the structure burned is *not* a dwelling house." (Emphasis in original). In September 2009, after Petitioner's trial, the standard jury instruction for burning other real property was amended to remove both the fourth element and the commentary.

of the statute leading to the acquittal was erroneous, the Double Jeopardy Clause barred a retrial. App. 53-62. In so holding, the appellate court relied on *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), *cert. den.*, 472 U.S. 1017 (1985), for the proposition that a trial judge's grant of a directed verdict is not an acquittal, and therefore does not implicate the Double Jeopardy Clause bar on retrial, if the judge misconstrues the statute so as to require the prosecution to prove an additional element not found in the offense. App. 59.

Petitioner appealed to the Michigan Supreme Court, again arguing that the Double Jeopardy Clause barred any further proceedings after the acquittal. The Michigan Supreme Court granted Petitioner's application for leave to appeal and affirmed in a four-to-three decision. App. 1.

The majority began by noting that it was undisputed that the trial judge had erred by requiring the prosecution to prove that the building was not a dwelling house. App. 1-2. The majority then held "that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." App. 2.

In reaching this conclusion, the majority relied on this Court's statement in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), defining

an acquittal as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." App. 12. According to the majority, that definition of "acquittal" left the issue in this case open because "the United States Supreme Court has not directly considered the related question at issue here regarding whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge." App. 13.

Having framed the question as whether the Double Jeopardy Clause bars retrial when a trial judge erroneously adds an element to the charged offense, the majority distinguished this Court's decisions in *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); and *Smith v. Massachusetts*, 543 U.S. 462 (2005), on the ground that the trial judges in those cases made erroneous rulings as to the evidence that could establish elements of the charged offenses rather than errors as to the elements themselves. App. 13-17. As the majority explained this distinction:

> We admit that, as in this case, the "acquittals" in *Rumsey*, *Smalis*, and *Smith* were based on the prosecution's failure to prove something that the law did not actually require it to prove. Acknowledging this similarity does not change the analysis, however, because the key distinction between those cases and the instant appeal remains: the

> trial courts in *Rumsey*, *Smalis*, and *Smith* resolved one of the factual elements of the crime charged, while the trial court in this case added an element and then found it unsupported by evidence in the record.

App. 17, n. 39.

The majority conceded that some language from *Smalis* and *Smith* supported Petitioner's position:

> We recognize that the United States Supreme Court has stated that "[t]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character," *Smalis*, 476 U.S. at 144 n. 7, and that "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law," *Smith*, 543 U.S. at 473.

App. 27, n. 64 (internal quotation and citation omitted). The majority concluded, however, that "these statements are not inconsistent with our view of the case at hand because they are necessarily made within the framework of the definition of acquittal established in *Martin Linen*[.]" *Id.* The majority repeatedly cited the Third Circuit's decision in *Maker* in support of its conclusion that *Martin Linen* allows review of a decision granting a directed verdict if the trial judge

erroneously added an element to the offense. App. 25, n. 58; 29, n. 67.

Three justices dissented. Justice Cavanagh, joined by Justice Kelly, concluded that the trial judge's ruling here was an acquittal and that this Court's decisions in *Rumsey*, *Smalis*, and *Smith* foreclosed the argument that an acquittal is reviewable if the judge erroneously construed the elements of the offense. App. 31-40. Observing that "it is apparent that the majority's opinion is influenced by *Maker*" as well as by a dissenting opinion in an earlier Michigan case, Justice Cavanagh suggested that *Maker* was wrongly decided. App. 41 & n. 6. Justice Hathaway dissented separately to "disagree with the distinction that the majority draws between a trial court's erroneous ruling related to a required element of an offense and a trial court's erroneous ruling related to a mistakenly added element of an offense." App. 44.

REASONS FOR GRANTING THE WRIT

I. The lower courts are split as to whether the Double Jeopardy Clause bars a retrial after the trial judge grants a midtrial directed verdict of acquittal based on an error of law that can be characterized as adding an element to the charged offense.

This case squarely presents a Double Jeopardy Clause issue that the Michigan Supreme Court believed to be an open question: "the United States

Supreme Court has not directly considered . . . whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge." App. 13.

The Michigan Supreme Court answered that question in the negative. In so holding, the court joined at least one federal circuit and one other state supreme court in holding that the Double Jeopardy Clause does not bar retrial after a midtrial grant of a directed verdict if the trial judge erroneously required the prosecution to prove an extra element. *See United States v. Maker*, 751 F.2d 614, 624 (3d Cir. 1984) (ordering retrial after directed verdict grant where "district court, as the result of a legal error, determined that the government could not prove a fact that is not necessary to support a conviction"), *cert. den.*, 472 U.S. 1017 (1985); *State v. Korsen*, 69 P.3d 126, 136-37 (Idaho 2003) (relying on *Maker* to conclude grant of acquittal did not bar retrial where judge "effectively created an additional statutory element"); *see also United States v. Lynch*, 162 F.3d 732, 735 (2d Cir. 1998) (noting government's argument that retrial permissible if district court granted directed verdict after adding element to offense but concluding district court erroneously construed existing element); *id.* at 746 (Feinberg, J., dissenting) (agreeing with *Maker* that retrial permissible because district judge relied on fact not required to establish defendants' guilt).

By contrast, other courts have rejected the "extraneous element" theory that the Michigan Supreme Court accepted in this case. *See, e.g., Carter v. State*, 227 S.W.3d 895, 898 (Ark. 2006) (holding Double Jeopardy Clause barred retrial following directed verdict even if trial court added element to the offense); *State v. Large*, 607 N.W.2d 774, 780 (Minn. 2000) (holding Double Jeopardy Clause barred retrial after directed verdict even if trial judge erroneously required prosecution to prove more than one act of sexual misconduct); *State v. Lynch*, 329 A.2d 629, 634, 636-37 (N.J. 1979) (holding Double Jeopardy Clause barred retrial after directed verdict even though trial court erroneously required prosecution to prove accessory after the fact had personal knowledge of principal's crime).

There is, therefore, a persistent split among the lower courts justifying the exercise of this Court's jurisdiction.

II. The decision below rests on a reading of *Martin Linen* that is unsustainable in light of this Court's more recent Double Jeopardy Clause precedents.

The major source of the split among the lower courts is the Third Circuit's decision in *Maker*. In the 28 years since *Maker* was decided, the Third Circuit has not overruled or cast doubt on the continuing validity of *Maker*, and this case marks the second time in the past ten years that a state's highest court

has relied on that decision to permit a retrial following a midtrial directed verdict. *See Korsen*, *supra*.

As the Third Circuit did in *Maker*, the Michigan Supreme Court seized upon the literal definition of "acquittal" that this Court provided in *Martin Linen* 35 years ago: "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. App. 12. *See Maker*, 751 F.2d at 622 ("We believe that this language [the *Martin Linen* definition of 'acquittal'] provides the crucial definition for determining whether double jeopardy bars an appeal"). Since the *Martin Linen* definition turns on "the factual elements of the offense charged," the Michigan Supreme Court reasoned that a directed verdict grant is not an "acquittal" if it is based on the prosecution's failure to prove an *extra* element. App. 2, 17, 26-27. Recognizing that this Court has held that a directed verdict is an "acquittal" barring retrial even if it is based on "erroneous interpretations of governing legal principles," *United States v. Scott*, 437 U.S. 82, 98 (1978), the Michigan Supreme Court, following the lead of *Maker*, attempted to draw a distinction between a misconstruction of the governing law and the addition of an element to the governing law. App. 27-28, n. 64.

But this Court's more recent cases make clear that *Maker*'s attempt to carve out an "extra element" exception from the *Martin Linen* definition of "acquittal" cannot withstand scrutiny. Such an exception would render the double jeopardy protections

established in those cases illusory and unpredictable. For example, in *Arizona v. Rumsey*, 467 U.S. 203, 206, 211 (1984), this Court held that the Double Jeopardy Clause barred retrial of a capital sentencing phase where the trial judge acquitted the defendant of a pecuniary value aggravating circumstance after erroneously holding that it applied only to "a contract-type killing situation and not to a robbery, burglary, etc." Under the logic of *Maker* and the decision below, there was an "acquittal" in *Rumsey* only if the trial court's error was to mistakenly construe the pecuniary value aggravating circumstance so as to require a contract killing, but there was *not* an acquittal if the trial court's error amounted to adding an extra element – that the killing was under contract. Plainly, there is no substantive difference between the two characterizations of the trial court's error in *Rumsey*. One can equally plausibly characterize the error as misconstruing an element or as adding an element.

Similarly, in *Smith v. Massachusetts*, 543 U.S. 462, 465 (2005), the trial judge granted a directed verdict of acquittal on the erroneous view that witness testimony as to the type of firearm the defendant possessed was inadequate to establish that the firearm had a barrel length of less than 16 inches. This Court held that the trial judge's ruling was an acquittal precluding further proceedings on that count even if it was patently wrong in law. *Id.* at 473. That result would be difficult to sustain under the logic of *Maker* and the decision below; the trial judge's

ruling could be characterized as adding an "extra element," that there be direct evidence of the firearm's barrel length, to the charged offense.

The Second Circuit's split decision in *United States v. Lynch*, 162 F.3d 732 (2d Cir. 1998), further illustrates the unpredictable and arbitrary nature of the "extra element" test. After the district court erroneously granted a directed verdict based on the absence of proof of bad intent, the government argued that retrial was permissible because the district court's error had effectively created a "fifth element of the offense." *Id.* at 735. The majority in *Lynch* disagreed, finding the "district court's error of law influenced its finding as to wilfulness and is integral to that element; it cannot be deemed (as the government argues) to be an additional, distinct, and severable element." *Id.* By contrast, the dissent, relying in part on *Maker*, would have permitted a retrial because the district court's error amounted to adding a fifth element, bad intent, to the offense. *Id.* at 745-46 (Feinberg, J., dissenting).

As these cases demonstrate, the distinction the Michigan Supreme Court found between a judge increasing the prosecution's burden by misconstruing the elements of an offense and increasing the prosecution's burden by adding an element to that offense is one of form and not substance. In Petitioner's case, the trial judge's error can equally plausibly be viewed as either: (1) the misconstruction of the definition of the second element of the charged offense, which requires the jury to find that "the property that was

burned was a building or any of its contents," Crim. Jury Inst. 2d 31.3(3); or (2) the addition of an element to the offense requiring proof that the property is not a dwelling house.

To put it simply, the definition of an "acquittal" and the resulting application of the Double Jeopardy Clause bar on retrial cannot turn on such semantic games. This Court should therefore grant certiorari to confirm that a defendant has been acquitted for purposes of the Double Jeopardy Clause if the judge finds that the prosecution has failed to prove an element of the offense even if the judge's ruling is based on a misconstruction of the elements of the offense and even if that misconstruction could be characterized as adding an element to the charged offense.

III. This case presents an excellent vehicle to resolve the Double Jeopardy Clause issue.

Petitioner's case squarely presents the question presented and has no confounding facts. The trial judge unambiguously granted a directed verdict of acquittal to Petitioner at the close of the prosecution's case because the prosecution had failed to prove that the property burned was not a dwelling house, a fact the trial judge erroneously believed to be an element of the offense. App. 68-71. The trial judge confirmed the acquittal with a written order. App. 72.

The prosecution appealed, and it is undisputed that Petitioner objected to retrial on Double Jeopardy Clause grounds in both state appellate courts. Therefore, both appellate courts issued comprehensive published opinions devoted to the Double Jeopardy Clause issue presented in this petition. When Petitioner's case reached the Michigan Supreme Court, both sides agreed that the trial court had committed a legal error in requiring the prosecution to prove that the building burned was not a dwelling house and that the only question to be resolved was the Double Jeopardy Clause effect of that error. App. 1-2.

Petitioner's case is therefore an excellent vehicle for this Court to decide whether a trial court's mid-trial grant of a directed verdict of acquittal is reviewable if it is based on an error of law that can be characterized as adding an element to the charged offense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated May 2, 2012

Michigan Supreme Court
Lansing, Michigan

	Chief Justice:	Justices:
	Robert P. Young, Jr.	Michael F. Cavanagh
		Marilyn Kelly
Opinion		Stephen J. Markman
		Diane M. Hathaway
		Mary Beth Kelly
		Brian K. Zahra

FILED MARCH 26, 2012

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiff-Appellee,

v

No. 141381

LAMAR EVANS,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

ZAHRA, J.

This case presents the question whether the Double Jeopardy Clauses of the state and federal constitutions bar defendant's retrial. Defendant was accused of burning a vacant house and charged on that basis with burning other real property in violation of MCL 750.73. There is no dispute that the trial court

wrongly added an extraneous element to the statute under which defendant was charged. Specifically, the trial court ruled that the prosecution was required to present proof that the burned house was not a dwelling, which is not a required element of MCL 750.73. As a result of the trial court's erroneous addition of this extraneous element to the charged offense, it granted defendant's motion for a directed verdict and entered an order of acquittal, dismissing the case. We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred. Accordingly, because the trial court's actions did not constitute an acquittal for the purposes of double jeopardy, we affirm the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Lamar Evans, was charged with burning other real property, MCL 750.73,[1] for starting

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[1] MCL 750.73 provides:

> Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another,

(Continued on following page)

a fire in a vacant house. At trial, two Detroit police officers testified that while on routine patrol on September 22, 2008, they observed a house on fire at 9608 Meyers Street and investigated. After hearing an explosion at the burning house, the officers observed defendant running away from the side of the house with a gasoline can. Officer Jermaine Owens got out of the patrol car and told defendant to stop. When defendant continued to run, Officer Owens chased defendant on foot. Defendant dropped the gasoline can during the chase, and Officer Owens caught defendant after he tripped and fell. Officer Cyril Davis, who had initially joined the chase on foot, returned to the patrol car and drove it to where Officer Owens had detained defendant. The officers testified that defendant told them he had made a mistake and burned down the house.

An arson investigator from the Detroit Fire Department, Lieutenant Christopher Smith, determined that the burn patterns in the house indicated the use of ignitable liquid accelerants. Further testing showed that gasoline had been poured in the kitchen, dining room, and a bedroom. As a result, Smith concluded that the fire was arson. No one was living in the house at the time of the fire, and the house lacked gas, electricity, and water service. The homeowner testified that he was in the process of purchasing the

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shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years.

house, which needed repairs, and that he and his family had begun moving their belongings into the house.

Upon the close of the prosecution's proofs, defense counsel moved for a directed verdict under MCR 6.419(A),[2] arguing that the prosecution had failed to prove that the burned building was not a dwelling house. Defense counsel argued that the jury instructions indicated that a necessary element of the burning of other real property is that the building was *not* a dwelling, while the prosecution's evidence reflected only that it *was* a dwelling. The prosecutor argued that nothing in MCL 750.73 required proof that the building was not a dwelling. The prosecutor also argued that it was unnecessary to read the instructions for the element that the building was not a dwelling and that the jury instructions are only a guide. The trial court then made the following ruling:

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[2] MCR 6.419(A) provides:

> After the prosecutor has rested the prosecution's case-in-chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.

The Court: The Court does not have an option of not reading all of the required elements in a jury instruction, and there are no optional elements in [CJI2d] 31.3. All of them are required. And the instructions are not a guide. They are what is required by law.[3]

Looking at the commentary, it refers to a distinction between [CJI2d] 31.2 and 31.3. [CJI2d] 31.2 is the instruction that is required for burning [a] dwelling house.

The commentary, speaking of CJI 2nd 31.1 [sic, 31.3], Burning Other Real Property, the commentary: "This offense is similar to the one described in CJI 2nd 31.2, except that an essential element is that the structure burned is not" – which is in italicized writing print – "a dwelling house." And then it cites *People v. Antonelli,* A-n-t-o-n-e-l-l-i, 64 Mich App 620, 238 NW 2nd 363 [1975], and

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[3] Contrary to the assertion of the trial court, the Michigan Criminal Jury Instructions are not binding on trial courts. These instructions are offered merely to assist a trial court in executing its duty to instruct on the law. *See People v. Petrella,* 424 Mich 221, 277; 380 NW2d 11 (1985). As we will discuss, the trial court ignored a use note in the instructions indicating that it was not appropriate to require proof that the building was not a dwelling unless instructing on the crime of burning other property as a lesser included offense of burning a building. Notwithstanding its failure to properly apply the use note, when there is the potential for inconsistency between a proposed instruction and the applicable law, the trial court had not only the right, but the obligation to reject or modify the instruction to bring it into conformity with the law.

notes that it was reversed on other grounds, and gives the citation as 66 Mich App 138, 238 NW 2nd 551 (1975).

And the commentary goes on to say: "As the Court explained on rehearing, common law arson required that the building be a dwelling. In creating the less serious crime of burning buildings other than dwellings, the legislature simply eliminated the element of habitation. Other real property is all real property not included in MCL 750.72."

And the People in this case have relied on MCL 750.73, which specifically says it cannot be a dwelling.

[*Prosecutor*]: Judge, could I have a moment to go upstairs and pull the statute and make sure that the statute addressed that. Because my understanding of the law is that it doesn't matter whether it's a dwelling or not, it just has to be a structure. And that's the reason for the –

The Court: Other than a house, because the legislature has imposed a higher penalty for one burning a house.

[MCL] 750.73 reads: "Burning of Other Real Property-Any person who willfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony . . . [.]" I won't give the term of punishment.

And it says: "Other than those specified in the next preceding." Isn't preceding before? The next preceding section of this chapter would be [MCL] 750.72.[MCL] 750.72 is entitled "Burning Dwelling House," and reads: "Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by him or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony." I will not read the term of punishment, but it is twice that which is specified in [MCL] 750.73.

So reading the language of [MCL] 750.73, which refers back to [MCL] 750.72, a dwelling house, either occupied or unoccupied, is excluded by law.

[*Prosecutor*]: Judge, may I have a moment to go upstairs and consult with my supervisors?

The Court: You can consult with them when you tell them I've granted the motion.

[*Defense Counsel*]: Thank you, Judge.

The Court: As a matter of law.

The testimony was this was a dwelling house, paid for for [sic] forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter.

Motion granted.

The prosecution appealed, and in an authored opinion, the Court of Appeals reversed the trial court's order granting defendant's motion for a directed verdict and remanded for further proceedings.[4] The panel stated that it was undisputed that the trial court had erred by concluding that the prosecution was required to prove that the burned building was not a dwelling to convict defendant of burning other real property.[5] The panel took note of this Court's statement in *People v. Nix*, 453 Mich 619, 556 NW2d 866 (1996), that retrial is barred when the trial court grants a directed verdict of acquittal even when the trial court is "'wrong with respect to whether a particular factor is an element of the charged offense.'"[6] Nonetheless, the panel characterized that statement as dicta because "the majority in *Nix* . . . acknowledg[ed] that it was unclear whether the situation that concerned the dissent, that dismissal of the case was premised on the prosecution's failure to establish a nonelement of an offense, had even occurred."[7]

The panel then considered the dissenting opinion in *Nix*, finding it persuasive to support its holding that "an actual acquittal occurs, for double jeopardy

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[4] *People v. Evans*, 288 Mich App 410, 411; 794 NW2d 848 (2010).

[5] *Id.* at 416-417.

[6] *Evans*, 288 Mich App at 418, quoting *Nix*, 453 Mich at 628.

[7] *Evans*, 288 Mich App at 419.

purposes, 'only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of a factual element necessary for a criminal conviction.'"[8] Applying this holding, the panel concluded that double-jeopardy principles did not bar retrial because the trial court had not resolved a factual element necessary to establish a conviction.[9] Rather, the trial court had based its directed verdict solely on the prosecution's failure to present any evidence establishing that the burned building was not a dwelling, which was not an element of the charged offense.[10]

Defendant applied for leave to appeal in this Court, and we granted leave to address "whether [defendant's] retrial is barred under the double jeopardy clauses of the state and federal constitutions where the trial court's grant of defendant's motion for a directed verdict was based on an error of law and did not determine any actual element of the charged offense."[11]

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[8] *Id.* at 421-422, quoting *Nix*, 453 Mich at 634-635 (BOYLE, J., dissenting).

[9] *Evans*, 288 Mich App at 423.

[10] *Id.*

[11] *People v. Evans*, 488 Mich 924 (2010).

II. STANDARD OF REVIEW

Defendant's claim that the double-jeopardy provisions of the United States and Michigan Constitutions bar his retrial is reviewed de novo.[12]

III. ANALYSIS

The United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense[13] in order "to prevent the state from making repeated attempts at convicting an individual for an alleged crime."[14] "[T]he double jeopardy prohibition 'is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.'"[15] In addition, this

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[12] *People v. Szalma*, 487 Mich 708, 715; 790 NW2d 662 (2010).

[13] US Const, Am V (protecting a criminal defendant from "be[ing] subject for the same offence to be twice put in jeopardy of life or limb"); Const 1963, art 1, § 15 ("No person shall be subject for the same offense to be twice put in jeopardy."). The Michigan Constitution's double-jeopardy provision is construed consistently with the Double Jeopardy Clause in the Fifth Amendment of the United States Constitution. *Szalma*, 487 Mich at 716.

[14] *People v. Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996), citing *People v. Dawson*, 431 Mich 234, 250; 427 NW2d 886 (1988).

[15] *Szalma*, 487 Mich at 717, quoting *Ball v. United States*, 163 US 662, 669; 16 S Ct 1192; 41 L Ed 300 (1896); *see also United States v. Martin Linen Supply Co.*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977) (characterizing this statement

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prohibition provides related protections against a second prosecution for the same offense after acquittal, second prosecution for the same offense after conviction, and multiple punishments for the same offense.[16] The protection against a second prosecution for the same offense after an acquittal is at issue here.[17] In considering whether retrying defendant would violate this protection, we must examine whether the trial court's ruling constituted an acquittal for the purposes of double jeopardy.

The United States Supreme Court set forth the standard for what constitutes an acquittal for the purposes of double jeopardy in *United States v. Martin Linen Supply Co* 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). The Court considered the effect of a verdict of acquittal entered pursuant to Rule 29(c)

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as "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence").

[16] *People v. Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004).

[17] In *Torres*, 452 Mich at 64, and *Dawson*, 431 Mich at 251, this Court quoted the oft cited rationale behind double-jeopardy protections from *Green v. United States*, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957), which stated:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

of the Federal Rules of Criminal Procedure once the jury had been discharged after being unable to reach a verdict.[18] It held that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action."[19] Rather, an acquittal for the purposes of double jeopardy is defined as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[20] Applying this definition, the Court concluded that the trial court's ruling constituted an acquittal for the purposes of double jeopardy because the trial court had evaluated all of the prosecution's evidence and determined that it was insufficient to sustain a conviction.[21]

Further, an acquittal, defined in *Martin Linen* as a resolution of the elements of the charged offense, "remains a bar to retrial even if it is 'based upon an

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[18] *Martin Linen*, 430 US at 565-567. The standard for granting a motion for acquittal is set forth in the subrule governing acquittal motions made before a case is submitted to a jury, FR Crim P 29(a), which authorized a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses."

[19] *Martin Linen*, 430 US at 571.

[20] *Id.*

[21] The Court pointed out that "[i]n entering the judgments of acquittal, the [trial] court also recorded its view that 'the Government has failed to prove the material allegations beyond a reasonable doubt' and that 'defendant should be found not guilty.'" *Id.* at 572 (citation and quotation marks omitted).

egregiously erroneous foundation.'"[22] Consistently with the idea that an acquittal can occur in some circumstances when the trial court errs, the United States Supreme Court has determined "that an acquittal is final even if it is based on an erroneous evidentiary ruling that precluded the prosecution from introducing evidence that would have been sufficient to convict the defendant."[23]

As noted in *People v. Szalma*, the United States Supreme Court has not directly considered the related question at issue here regarding whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge.[24] In reaching the conclusion that the United States Supreme Court has not directly addressed this issue, we believe that *Szalma* persuasively distinguished the relevant decisions from that Court: *Arizona v. Rumsey*, 467 US 203; 104 S Ct 2305; 81 L Ed 2d 164 (1984), *Smalis v. Pennsylvania*, 476 US 140; 106 S Ct 1745; 90 L Ed 2d 116 (1986), and *Smith v. Massachusetts*, 543 US 462; 125 S Ct 1129; 160 L Ed 2d 914 (2005).[25]

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[22] *Szalma*, 487 Mich at 717, quoting *Fong Foo v. United States*, 369 US 141, 143, 82 S Ct 671, 7 L Ed 2d 629 (1962).

[23] *Szalma*, 487 Mich at 717-718, citing *Sanabria v. United States*, 437 US 54, 68-69' 98 S Ct 2170; 57 L Ed 2d 43 (1978) (emphasis omitted).

[24] *Szalma*, 487 Mich at 718.

[25] *Id.* at 718 n 21.

In *Rumsey*, the trial court considered whether there was evidence of the statutory aggravating factors that permit a jury to decide whether the death penalty is warranted. The aggravating factor at issue was whether a murder occurred "'as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.'"[26] As *Szalma* explained, the trial court had "erroneously ruled that this aggravating circumstance only involved murders for hire, rather than *any* murder occurring during the course of a robbery, as the Arizona Supreme Court had interpreted the statute."[27] The United States Supreme Court concluded "that the trial court's decision operated as a verdict on whether defendant was eligible for the death penalty, and that therefore, defendant could not subsequently be placed in jeopardy of death for the same offense, notwithstanding the trial court's 'misconstruction of the statute defining the pecuniary gain aggravating circumstance.'"[28]

Szalma also addressed *Smalis*, in which the United States Supreme Court considered "whether a trial court's granting of a 'demurrer' within the commonwealth of Pennsylvania's rules of criminal procedure involved an acquittal for double jeopardy purposes."[29] The Pennsylvania Supreme Court had held that it

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[26] *Id.* at 205, quoting Ariz Rev Stat Ann 13-703(F)(5).

[27] *Szalma*, 487 Mich at 719 n 21.

[28] *Id.*, quoting *Rumsey*, 467 US at 211.

[29] *Szalma*, 487 Mich at 719 n 21, citing *Smalis*, 476 US 140.

was not, reasoning that in deciding whether to grant a demurrer, the trial court was not required to determine a defendant's guilt, but only "whether the evidence, if credited by the jury, [was] legally sufficient to warrant the conclusion that the defendant is guilty beyond a reasonable doubt."[30] The United States Supreme Court reversed, holding that such a ruling constituted an acquittal for double-jeopardy purposes despite "an alleged error that the trial court committed in interpreting the 'recklessness' element of Pennsylvania's third-degree murder statute."[31]

In *Smith,* the trial court granted an acquittal on a firearm charge on the basis of its determination that there was no evidence for the element included in the statute governing unlawful possession of a firearm that the barrel length of the gun possessed was less than 16 inches.[32] After trial continued on the remaining charges, the trial court reversed its ruling when the prosecutor identified precedent under which the victim's testimony about the kind of gun sufficed to establish that the barrel was shorter than 16 inches.[33] Despite the trial court's initial error regarding what evidence could prove the barrel-length element, the United States Supreme Court held that this initial ruling "meets the definition of

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[30] *Smalis,* 476 US at 143 (citation omitted).

[31] *Szalma,* 487 Mich at 719 n 21, citing *Smalis,* 476 US at 144 n 7.

[32] *Smith,* 543 US at 464-465.

[33] *Id.* at 465.

acquittal that our double-jeopardy cases have consistently used: It 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.' "[34]

Reviewing *Rumsey, Smalis,* and *Smith,* we agree with the reasoning in *Szalma* that each of these cases involves evidentiary errors regarding the proof needed to establish a factual element of the respective crimes at issue.[35] Specifically, in *Rumsey,* the trial court's error concerned "not *whether* a particular aggravating circumstance [i.e., element] existed to allow a jury to impose a death penalty for first-degree murder, but *how the prosecutor must prove the occurrence of that circumstance in a particular case.*"[36] Similarly, in *Smalis,* the trial court's alleged error concerned *how* to prove the recklessness element, not *whether* the recklessness element existed.[37] Additionally, in *Smith,* the trial court's error regarded "not *whether* a particular element to the crime" of unlawful possession of a firearm "existed, but rather *what evidence could prove that element.*"[38]

Following *Martin Linen,* these decisions establish that when a trial court makes an error regarding the sufficiency of the evidence to satisfy a factual element

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[34] *Id.* at 468, quoting *Martin Linen,* 430 US at 571.

[35] *Szalma,* 487 Mich at 718 n 21.

[36] *Id.* at 719 n 21.

[37] *See id.*

[38] *Id.* at 718 n 21.

or elements of the charged offense, that resolution nonetheless constitutes an acquittal for the purposes of double jeopardy. As we discuss, the principles behind the prohibition against double jeopardy and the definition of acquittal set forth in *Martin Linen* support the proposition that a constitutionally meaningful difference exists between this case, in which the trial court identified an extraneous element and dismissed the case solely on that basis, and *Rumsey*, *Smalis*, and *Smith*, in which the trial courts made evidentiary errors regarding how to prove the governing law. Accordingly, these decisions do not implicate the case at hand because the trial court's error here resulted in a dismissal without a resolution regarding the sufficiency of the factual elements of the charged offense.[39]

Although the United States Supreme Court has not directly considered the question presented here, this Court has dealt with this issue before in *Nix* and *Szalma*.[40] *Nix* considered, for the purposes of double jeopardy, the effect of the trial court's ruling that the

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[39] We admit that, as in this case, the "acquittals" in *Rumsey*, *Smalis*, and *Smith* were based on the prosecution's failure to prove something that the law did not actually require it to prove. Acknowledging this similarity does not change the analysis, however, because the key distinction between those cases and the instant appeal remains: the trial courts in *Rumsey*, *Smalis*, and *Smith* resolved one of the factual elements of the crime charged, while the trial court in this case added an element and then found it unsupported by evidence in the record.

[40] *See Szalma*, 487 Mich at 718.

defendant "could not be convicted of either [first-degree premeditated murder or first-degree felony-murder] as a matter of law" because the defendant "'owed no legal duty to the victim. . . .'"[41] In responding to the dissent, *Nix* stated:

> The dissent appears to read the *Martin Linen* standard as if the phrase "correct or not" refers to the factual truth of the prosecution's evidence, a determination completely outside the trial court's purview in a jury trial when considering a defendant's motion for directed verdict. When ruling on a motion for directed verdict, a trial court must, as this trial court did, view the prosecution's evidence in the light most favorable to the prosecution. Accordingly, the trial court cannot make an erroneous factual resolution. The phrase "correct or not" refers to all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense. As discussed below,

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[41] *Nix*, 453 Mich at 622. The victim in *Nix* died after the defendant's boyfriend kidnapped the victim and locked her in her own trunk. *Id.* at 621. Specifically, "[t]he victim died six days later of dehydration and methanol poisoning, before which time, the prosecution alleged, the defendant was told of the victim's screams coming from the trunk." *Szalma*, 487 Mich at 720 n 23, citing *Nix*, 453 Mich at 630.

> however, it is not clear that this situation even exists in the case at bar.[42]

These statements do not control the outcome here because they are nonbinding obiter dicta.[43] The quotation from *Nix* explicitly stated that it was "not clear that this situation" – i.e., one in which "the trial court [was] factually wrong with respect to whether a particular factor is an element of the charged offense" – had even occurred."[44] Rather, *Nix* reflected the conclusion that the trial court had not erred on its view of what made up the essential elements.[45] Consequently, the quoted observations regarding the definition of

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[42] *Nix*, 453 Mich at 628.

[43] "Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication." *People v. Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) (citation and quotation marks omitted).

[44] *Nix*, 453 Mich at 628.

[45] *Id.* at 631. Specifically, the majority asserted that "the dissent's focus on the fact that 'duty' is not a specifically enumerated element of kidnapping is not significant and, under the actual facts presented here, a distinction without a difference." *Id.* In the majority's view, the prosecution's case was entirely predicated on the theory that the defendant, after allegedly learning that the victim was in the trunk, "became complicit in the criminal endeavor when she failed to act to free or otherwise aid the victim." *Id.* This theory necessarily included the idea that the defendant "had a duty to act in some way[.]" *Id.* Thus, the majority took the view that the trial court had not erred in its view regarding the defendant's duty because proving the defendant's duty was necessary to show the *actus reus*, which is an essential element of every crime.

acquittal were unnecessary to determine the outcome in *Nix* and do not compel a result in this case.

Further, *Szalma* does not compel treating the pertinent statements in *Nix* as controlling. *Szalma* discussed *Nix* when considering whether a trial court's erroneous legal analysis regarding the sufficiency of the evidence to support a conviction of first-degree criminal sexual conduct constituted an acquittal for the purposes of double jeopardy.[46] Specifically, the trial court in *Szalma* granted the defendant's motion for a directed verdict after erroneously ruling that the fact-finder had to conclude that the defendant committed the assault for a sexual purpose.[47]

We pointed out in *Szalma* that *Nix* barred a retrial of the defendant because, under *Nix*, "an acquittal retains its finality for double jeopardy purposes even when 'the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense.' "[48] We refused to address the prosecution's argument regarding whether *Nix* was correctly decided because the prosecutor at trial had conceded the underlying erroneous statement of the elements.[49] As a result, we reversed the Court of

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[46] *See Szalma*, 487 Mich at 709-710, 720, 722, 725-726.

[47] *Id.* at 722-723.

[48] *Id.* at 726, quoting *Nix*, 453 Mich at 628.

[49] *Szalma*, 487 Mich at 725.

Appeals' judgment and reinstated the trial court's directed verdict of acquittal.[50]

Szalma does not control the instant case because, here, the prosecutor did not concede the underlying legal error at trial. Rather, the prosecutor argued that the charged offense did not include the element that the building was not a dwelling. Accordingly, the prosecution's argument is properly before us. In addition, because we refused in *Szalma* to permit the prosecutor to harbor error at trial and then use that error as an appellate parachute, we could not properly reach the application of *Nix*. In fully considering *Nix* now, we will not ignore the *Nix* majority's conclusion that it was not clear that the situation bringing about its double-jeopardy discussion had even occurred.

In making its ruling in the instant case, the trial court acted under MCR 6.419(A),[51] granting defendant's motion for a directed verdict because the prosecution had failed to provide evidence that the burned house was not a dwelling. The trial court undisputedly misapprehended CJI2d 31.3[52] in its legally

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[50] *Id.* at 727.

[51] Pursuant to MCR 6.419(A), after the close of the prosecution's case-in-chief, the court "may . . . direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction."

[52] CJI2d 31.3, Burning Other Real Property, provided before its amendment in September 2009:

> (1) [The defendant is charged with the crime of / You may also consider the lesser charge of] burning a

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building or any of its contents. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant burned [*describe property alleged*]. The term "burn" in this case means setting fire to or doing anything that results in the starting of a fire, or helping or persuading someone else to set a fire. If any part of the [*describe property*] is burned, [no matter how small,] that is all that is necessary to count as a burning; the property does not have to be completely destroyed. [The (*describe property*) is not burned if it is merely blackened by smoke, but it is burned if it is charred so that any part of it is destroyed.]

(3) Second, that the property that was burned was a building or any of its contents. [It does not matter whether the defendant owned or used the building.]

(4) Third, that when the defendant burned the building or its contents, [he/she] intended to burn the building or contents or intentionally committed an act that created a very high risk of burning the building or contents and that, while committing the act, the defendant knew of that risk and disregarded it.

[(5) Fourth, that the building was not a dwelling house. A dwelling house is a structure that is actually being lived in or that could reasonably be presumed to be capable of being lived in at the time of the fire. (A business that is located very close to and used in connection with a dwelling may be considered to be a dwelling.)]

A use note indicated that ¶ (5) "should be used when instructing on the crime as a lesser included offense of burning a building." An amendment to the instruction in September 2009 removed ¶ (5) and the use note.

erroneous analysis that added an extraneous element to the charged offense.[53] The trial court's confusion apparently stemmed from its reliance on a jury instruction read when the crime of burning other real property is charged as a lesser included offense of the crime of burning a dwelling.[54] The panel in *People v. Antonelli* (*On Rehearing*) rightly stated, however, that "[t]he necessary elements to prove either offense are the same, except to prove the greater it must be shown that the building is a dwelling; to prove the lesser it is not necessary to prove that the building is not a dwelling."[55] Thus, the trial court wrongly determined that showing that the burned building was not a dwelling is an element of burning other real property.

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[53] The elements of burning of other real property, MCL 750.73, are "(1) the burning of any building or other real property, or the contents thereof, and (2) that the fire was willfully or maliciously set." *People v. Greenwood*, 87 Mich App 509, 514 n 1; 274 NW2d 832 (1978).

[54] MCL 750.72, which prohibits the burning of a dwelling, provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years.

[55] *People v. Antonelli* (*On Rehearing*), 66 Mich App 138, 140; 238 NW2d 551 (1975).

We agree with the Court of Appeals that defendant's retrial is not barred because the trial court's ruling dismissing the case did not constitute an acquittal for the purposes of double jeopardy. "[T]he trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action."[56] Consequently, the trial court's actions pursuant to MCR 6.419(A) and its entry of an order of acquittal do not control. Although these actions take the form of an acquittal, we are concerned with the substance of the trial court's ruling.

Again, an acquittal for double-jeopardy purposes is a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *factual elements* of the offense charged."[57] The trial court's legal error resulted in its adding an element to the charged offense and requiring the prosecution to provide proof of that extraneous element. As the Court of Appeals concluded, the trial court did not resolve or even address any factual element necessary to establish a conviction for burning other real property. Rather, the substance of the trial court's ruling was entirely focused on the extraneous element. Consequently, the trial court's decision was based on an error of law unrelated to defendant's guilt or innocence on the elements of the

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[56] *People v. Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997).

[57] *Martin Linen*, 430 US at 571 (emphasis added).

charged offense, and thus the trial court's dismissal of the charge did not constitute an acquittal.[58]

Nix misconstrued the definition of acquittal in *Martin Linen,* stating that "on a motion for directed verdict, a trial court must, as this trial court did, view the prosecution's evidence in the light most favorable to the prosecution. Accordingly, the trial court cannot make an erroneous factual resolution."[59] As the prosecution argues, however, a trial court certainly can make an erroneous factual resolution in ruling on a motion for a directed verdict. The trial court can do so, for instance, when it forgets about evidence or does not realize that certain evidence can satisfy a factual element. This is what took place in *Smith v. Massachusetts,* discussed earlier, when the trial court failed to realize that testimony that the defendant appeared to have a .32 or .38 caliber revolver was sufficient to establish that the factual element that the barrel of the gun was shorter than 16 inches.[60] This incorrect resolution of a factual element in *Smith* constituted an acquittal for the purposes of double jeopardy.

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[58] Accord *United States v. Maker,* 751 F.2d 614, 622 (CA 3, 1984) (holding that a judicial ruling is an acquittal "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction").

[59] *Nix,* 453 Mich at 628.

[60] *Smith,* 543 US at 465.

From this faulty presumption that a trial court cannot make an erroneous factual resolution, *Nix* wrongly observed that the phrase "correct or not" from *Martin Linen's* definition of acquittal "refers to all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense."[61] A court cannot, however, be factually wrong regarding what makes up the elements of the crime because an erroneous determination of what constitutes the elements of an offense is a legal error, not a factual one.[62]

Instead, the definition of acquittal in *Martin Linen* and the phrase "correct or not" means that it is of no consequence for the purposes of double jeopardy whether the trial court's resolution of the *factual elements* is correct. Nonetheless, this resolution must be based on at least some of the factual elements of the charged crime. By adding an extraneous element – that the prosecution needed to prove that the burned building was not a dwelling – the trial court's legal error did not involve a resolution of any of the factual elements of the charged offense, and thus its

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[61] *Nix*, 453 Mich at 628.

[62] *See United States v. Boyle*, 469 US 241, 249 n 8; 105 S Ct 687, 83 L Ed 2d 622 (1985) ("Whether the elements that constitute "reasonable cause" are *present* in a given situation is a question of fact, but what elements *must* be present to constitute "reasonable cause" is a question of law."); *People v. Holtschlag*, 471 Mich 1, 4; 684 NW2d 730 (2004) ("Determining the elements of common-law involuntary manslaughter is a question of law.").

ruling does not fall within the definition of acquittal for the purposes of double jeopardy.

We further conclude that the distinction we have drawn from the relevant United States Supreme Court decisions is reasonable and constitutionally grounded. Rather than uniformly determine that any instance in which a trial court enters an order of acquittal definitively bars retrial, the United States Supreme Court has opted to consistently apply the definition of acquittal from *Martin Linen*.[63] By doing so the Court has determined that the labels the trial court used are not controlling and that a resolution must be on the factual elements to constitute an acquittal. But the line, once crossed, triggers double-jeopardy protections regardless of the correctness of the trial court's decision.[64]

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[63] *See Smith*, 543 US at 467-468.

[64] We recognize that the United States Supreme Court has stated that "'[t]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character,'" *Smalis*, 476 US at 144 n 7, quoting *United States v. Scott*, 437 US 82, 98; 98 S Ct 2187; 57 L Ed 2d 65 (1978), and that "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law," *Smith*, 543 US at 473. But we disagree with Justice CAVANAGH that our position "diminishes" or "minimizes" these statements because they have no effect on our distinction between an evidentiary error regarding the proof necessary to establish a factual element and the effect of a legal error in which

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We believe that the application of the definition of acquittal reflects a balancing of the public's interest in having one full and fair opportunity to prosecute a criminal case[65] and the interest in protecting a criminal defendant from being subjected "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[66] When considering the application of this definition and the weighing of these interests, it is reasonable to treat differently cases in which the resolution was based on the prosecution's failure to prove something that the law, properly understood, did not require it to prove. Doing so depends on whether the trial court actually considered

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an extraneous element is added to the charged offense. *Post* at 1, 7. Furthermore, these statements are not inconsistent with our view of the case at hand because they are necessarily made within the framework of the definition of acquittal established in *Martin Linen* and the United States Supreme Court has not cast doubt on the viability of that definition. Additionally, it is clear that this case does not involve an erroneous evidentiary ruling or an erroneous interpretation of governing legal principles. The trial court, rather than rightly or wrongly interpreting the governing legal principles, opted to invent a governing principle, terminating the trial on a ground unrelated to defendant's factual guilt or innocence. The statement from *Smith* is similarly inapplicable because it was made after the Court had already concluded that an acquittal had occurred. We do not assert that the Double Jeopardy Clause is the avenue for correcting the trial court's error. Instead, because an "acquittal" did not occur, the prohibition against double jeopardy is not implicated.

[65] *See Scott*, 437 US at 100.

[66] *Green*, 355 US at 187-188.

the factual elements of the charged offense. A resolution of the factual elements, even if erroneous, crosses the established bright line. But a court's adding an extraneous element and resolving the case solely on the basis of that added element prevents any evaluation of the charged crime on the merits and thus completely thwarts society's interest in allowing the prosecution one full and fair opportunity to present its case.[67]

Therefore, barring retrial is inappropriate in a case such as this. Because of the trial court's legal error, no factual elements of the charged offense were considered, and as a result the people have not been afforded the opportunity to have their case reviewed for the sufficiency of the evidence on the factual elements even once. Permitting retrial to allow such

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[67] *See Maker,* 751 F2d at 624, which stated:

> Our conclusion that an appeal is not barred in this case is consistent with the policies underlying the double jeopardy clause. This is not a case in which a second trial is permitted "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States,* 437 U.S. 1, 11, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978). Instead, this is a case in which the district court, as the result of a legal error, determined that the government could not prove a fact that is not necessary to support a conviction. To preclude an appeal in this case would deprive the public "of its valued right to 'one complete opportunity to convict those who have violated its laws.'" *Scott,* 437 U.S. at 100, 98 S.Ct. at 2198 (quoting *Arizona v. Washington,* 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1975)).

an opportunity hardly depicts "an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact."[68] Rather, because the trial court's actions fell outside the definition of acquittal, permitting defendant's retrial does not frustrate the prohibition against double jeopardy.

IV. CONCLUSION

We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred. Accordingly, because the trial court's actions here did not constitute an acquittal for the purposes of double jeopardy, we affirm the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

Brian K. Zahra
Robert P. Young, Jr.
Stephen J. Markman
Mary Beth Kelly

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[68] *Scott*, 437 US at 96; *see also id.* at 98-99 (holding that that retrial is permitted when the defendant elects to terminate the trial on a procedural basis unrelated to the defendant's factual guilt or innocence).

CAVANAGH, J. (*dissenting*).

The issue presented in this case was decided more than a decade ago in *People v. Nix*, 453 Mich 619; 556 NW2d 866 (1996). In that case, this Court held that an acquittal for purposes of the Double Jeopardy Clauses of the Michigan and United States Constitutions occurs when a trial court evaluates the government's evidence and determines that it is legally insufficient to sustain a conviction, regardless of whether the acquittal was based on an "'egregiously erroneous foundation,'" *id.* at 630-631 (citation omitted), and including those cases in which the trial court was incorrect regarding whether a particular factor is actually an element of the charged offense, *id.* at 628. Although *Nix* was based on an application of United States Supreme Court precedent and precedent from this Court, today the majority effectively overrules *Nix* and, in doing so, diminishes the United States Supreme Court's directive that "*any contention* that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach" even "to a preverdict acquittal that is patently wrong in law." *Smith v. Massachusetts*, 543 US 462, 473; 125 S Ct 1129; 160 L Ed 2d 914 (2005) (emphasis added). Because *Nix* is harmonious with established United States Supreme Court precedent, I respectfully dissent from the majority's decision to summarily disregard *Nix*.

I. DOUBLE-JEOPARDY JURISPRUDENCE

It is axiomatic that under both the state and federal constitutions, a defendant may not be twice put in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The underlying focus of the Double Jeopardy Clause is on a defendant's exposure to the personal strain, embarrassment, and expense of a criminal trial more than once for the same offense. *See United States v. Scott,* 437 US 82, 87; 98 S Ct 2187; 57 L Ed 2d 65 (1978), citing *Green v. United States,* 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957); *Smalis v. Pennsylvania,* 476 US 140, 143 n 4; 106 S Ct 1745; 90 L Ed 2d 116 (1986). Accordingly, the guarantee against double jeopardy "'protects against a second prosecution for the same offense after acquittal.'" *United States v. DiFrancesco,* 449 US 117, 129; 101 S Ct 426; 66 L Ed 2d 328 (1980) (citation omitted). Notably, the United States Supreme Court has explained that "'the most fundamental rule in the history of double jeopardy jurisprudence'" is that an acquittal "'may not be reviewed,'" on error or otherwise, "'without putting the defendant twice in jeopardy. . . .'" *Sanabria v. United States,* 437 US 54, 64; 98 S Ct 2170; 57 L Ed 2d 43 (1978), quoting *United States v. Martin Linen Supply Co.,* 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977) (citation and quotation marks omitted). Consistent with this notion, an acquittal is "absolute," *People v. Anderson,* 409 Mich 474, 483; 295 NW2d 482 (1980), regardless of whether the acquittal is "based on a jury verdict of not guilty or on a ruling by the [trial] court

that the evidence is insufficient to convict. . . ." *Scott*, 437 US at 91.[1] The threshold question in these types of cases, then, is whether a trial court's ruling on a defendant's motion for a directed verdict was, in fact, an acquittal. *Smith*, 543 US at 467.

To determine whether an acquittal actually occurred for purposes of a double-jeopardy analysis, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 US at 571 (emphasis added). As the United States

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[1] The United States Supreme Court has further elaborated that it has "long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal *to the same extent* it prohibits reexamination of an acquittal by jury verdict," regardless of whether the judge's ruling of acquittal comes in a bench trial or a jury trial. *Smith*, 543 US at 467 (emphasis added). The Court also explained that there is a "single exception to the principle that acquittal by judge precludes reexamination of guilt no less than acquittal by jury": the prosecution can appeal to reinstate a jury's verdict of guilty after a "trial judge (or an appellate court) sets aside that verdict and enters a judgment of acquittal. . . ." *Id.* That exception, however, is not applicable in this case. *See, also, DiFrancesco*, 449 US at 130 (stating that the Court "necessarily afford[s] absolute finality to a jury's *verdict* of acquittal – no matter how erroneous its decision") (citation and quotation marks omitted); *Sanabria*, 437 US at 64 n 18 (stating that "[i]t is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal"); cf. *People v. Ellis*, 468 Mich 25; 658 NW2d 142 (2003).

Supreme Court has explained, "what matters is that . . . the [trial] judge 'evaluated the . . . evidence and determined that it was legally insufficient to sustain a conviction.'" *Smith,* 543 US at 469, quoting *Martin Linen,* 430 US at 572. Accordingly, an order entering a finding that the evidence was insufficient to sustain a conviction "meets the definition of acquittal that [the] double-jeopardy cases have consistently used. . . ." *Smith,* 543 US at 468; *see, also, Anderson,* 409 Mich at 486; *Nix,* 453 Mich at 625-627; 630-631.

Notably, the United States Supreme Court has stated that the "fundamental nature" of the rule barring review of a verdict of acquittal is "manifested by its *explicit extension*" to situations in which an acquittal was based on an incorrect foundation. *Sanabria,* 437 US at 64 (emphasis added). On the basis of this extension, when a defendant is acquitted because of a determination that the evidence was insufficient to support a conviction, "there is no exception permitting retrial," *id.* at 75, "even if the legal rulings underlying the acquittal were erroneous," *id.* at 64, and "no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be," *id.* at 75, quoting *Fong Foo v. United States,* 369 US 141, 143; 82 S Ct 671; 7 L Ed 2d 629 (1962); *see, also, Arizona v. Rumsey,* 467 US 203, 211; 104 S Ct 2305; 81 L Ed 2d 164 (1984) (explaining that United States Supreme Court precedent establishes that an "acquittal on the merits bars retrial even if based on legal error"). Thus, "[t]he status of the trial court's judgment as an acquittal is not affected" by a trial

court's legal error in interpreting governing legal principles: "'[T]he fact that the acquittal may result from erroneous evidentiary rulings *or* erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character.'" *Smalis,* 476 US at 144 n 7 (emphasis added; citation and quotation marks omitted), quoting *Scott,* 437 US at 98, and citing *Sanabria,* 437 US 54 and *Rumsey,* 467 US 203.

In summary, the United States Supreme Court has repeatedly stated that a trial court's "ruling that as a matter of law the State's evidence is insufficient to establish [the defendant's] factual guilt" is a "'resolution, correct or not, of some or all of the factual elements of the offense charged'" and, therefore, constitutes an acquittal for purposes of the Double Jeopardy Clause. *Smalis,* 476 US at 144 & n 6. Further, that an acquittal was founded on an erroneous legal ruling is irrelevant: the trial court's judgment of acquittal based on a finding of insufficient evidence, however erroneous, bars retrial. *See id.* at 145 n 7; *Rumsey,* 467 US at 211. Although I welcome the majority's decision to embrace policy considerations for the purpose of this appeal, as the United States Supreme Court has explained, "[w]hat may seem superficially to be a disparity in the rules governing a defendant's liability to be tried again is explainable by reference to the underlying purposes of the Double Jeopardy Clause." *Scott,* 437 US at 91. Specifically, the rule barring retrial after an acquittal is "justified on the ground that, *however mistaken the acquittal*

may have been, there would be an unacceptably high risk that the Government, with it [sic] superior resources, would wear down a defendant, thereby 'enhancing the possibility that even though innocent he may be found guilty.'" *DiFrancesco,* 449 US at 130 (emphasis added), quoting *Green,* 355 US at 188.

II. *NIX* IS HARMONIOUS WITH ESTABLISHED PRECEDENT

As the foregoing summary illustrates, the principles articulated in *Nix* are both founded on and harmonious with longstanding United States Supreme Court caselaw. *See Nix,* 453 Mich at 624-632; *see, also, People v. Szalma,* 487 Mich 708, 727-729; 790 NW2d 662 (2010) (CAVANAGH, J., concurring). Thus, *Nix* was not, as the majority asserts, based on faulty presumptions or misconstructions of United States Supreme Court precedent. Indeed, contrary to the majority's position, it bears repeating that the United States Supreme Court "has never held that a trial court's preverdict acquittal on the merits may be reversed because of a legal error." *Szalma,* 487 Mich at 728 n 1 (CAVANAGH, J., concurring). Instead, as I have noted, the Court has repeatedly stated the opposite, without crafting the distinction that the majority creates today. In fact, the United States Supreme Court recently reaffirmed the principle that the Double Jeopardy Clause does not provide an exception for legal errors, even if the preverdict acquittal was "patently wrong in law." *Smith,* 543 US at 473.

Accordingly, as explained in *Nix*, it is irrelevant for purposes of the Double Jeopardy Clause that an acquittal was founded on an erroneous interpretation of a governing legal principle. *Nix*, 453 Mich at 626-628, 630-631; *see, also, Smalis*, 476 US at 144 n 7. This is so regardless of whether the erroneous interpretation of the governing legal principle is based on an error in interpreting a statutory requirement or, as in this case, an error in determining the actual elements necessary to commit an offense. *Szalma*, 487 Mich at 728 n 2 (CAVANAGH, J., concurring), citing *Rumsey*, 467 US at 211.

Further, it elevates form over substance to make such a distinction, as the majority does today. In my view, *Rumsey* illustrates this point. In that case, a trial court misconstrued a statute defining an aggravating circumstance used for determining whether the death penalty was appropriate. Specifically, the trial court erroneously agreed with the defendant that the statute required the prosecution to prove beyond a reasonable doubt that the murder was a "contract-type" killing, rather than a murder committed during the course of a theft. *Rumsey*, 467 US at 205-207. Because the trial judge found that this aggravating circumstance was not present, the defendant's life was spared. *Id.* at 206. Despite the trial court's error in interpreting the statute, the United States Supreme Court affirmed the Arizona Supreme Court's ruling that the defendant "had effectively been 'acquitted' of death at his initial sentencing," *id.* at 208, holding that, although the trial court had

relied on a misconstruction of the statute defining the aggravating circumstance, that error of law was of no avail to the prosecution for purposes of the Double Jeopardy Clause. *Id.* at 211.[2] Although *Rumsey* addressed the proper interpretation of the statute's requirements, as even the majority here concedes, the trial court in *Rumsey* required the prosecution to prove something that it was not otherwise required to prove: that the murder was a contract-type killing.

In my view, creating a distinction between improperly adding an element to an offense and misconstruing an actual element of a statute to require the prosecution to prove something extraneous – both situations in which the trial court, because of a legal error, technically determined that the government could not prove a fact that was not necessary to support a conviction – elevates form over substance. In addition, the majority's distinction minimizes the

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[2] As I have stated before, the error in *Rumsey* was clearly related to the proper interpretation of the statute's requirements, rather than a mere evidentiary error as the majority purports. *Szalma*, 487 Mich at 728 n 2, (CAVANAGH, J., concurring). *See, also, Smalis*, 476 US at 145 n 8 (explaining that *Rumsey* involved "an erroneous construction of the [governing] law"). Further, it bears repeating that "the majority's discussion of whether the errors in certain cases should be characterized as evidentiary errors is irrelevant because . . . the United States Supreme Court has repeatedly stated" that the Double Jeopardy Clause precludes retrial when there has been an acquittal on the merits "regardless of *either* evidentiary errors *or* erroneous interpretations of governing legal principles." *Szalma*, 487 Mich at 728 n 2 (CAVANAGH, J., concurring).

United States Supreme Court's general directive that the Double Jeopardy Clause does not provide an exception for legal errors, even if the acquittal is "patently wrong in law," *Smith*, 543 US at 473, and "no matter how 'egregiously erroneous' . . . the legal rulings leading to that judgment might be," *Sanabria*, 437 US at 75 (citations omitted).[3]

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[3] In light of the United States Supreme Court's broad assertion that "*any contention* that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that *the bar will attach to a preverdict acquittal that is patently wrong in law*," *Smith*, 543 US at 473 (emphasis added), I disagree with the majority's assertion that the Court's statement in *Smith* does not apply in this case. *See, also, Sanabria*, 437 US at 64 (stating that the "fundamental nature" of the rule barring review of a verdict of acquittal is "manifested by its *explicit extension to situations where an acquittal is 'based upon an egregiously erroneous foundation'*") (emphasis added), quoting *Fong Foo*, 369 US at 143. Accordingly, the United States Supreme Court has clearly and emphatically stated that the bar to retrial attaches even when the acquittal itself is legally wrong or based on an incorrect foundation, notwithstanding the majority's assertions to the contrary in this case. *See ante* at 22 n 64 (stating that *Smith* does not apply because the Court had already concluded that an acquittal had occurred and asserting that this case does not involve an erroneous interpretation of a governing legal principle because the trial court opted to "invent a governing principle"); *see, also, Smith*, 543 US at 467-468 (stating that an order entering a finding that the evidence was insufficient to sustain a conviction "meets the definition of acquittal that [the] double-jeopardy cases have consistently used: It 'actually represents a resolution, *correct or not*, of some or all of the factual elements of the offense charged.'"), quoting *Martin Linen*, 430 US at 571 (emphasis added); *Smalis*, 476 US at 144 (stating that a "ruling that as a matter of law the State's evidence is insufficient to

(Continued on following page)

Therefore, I disagree with the majority's conclusion that an error in interpreting a statutory requirement should be treated differently from an error in interpreting the elements necessary for an offense: both errors constitute an erroneous interpretation of a governing legal principle, and both errors may involve a situation in which the trial court's decision was "based upon the prosecution's failure to prove something that the law, properly understood, did not require it to prove." *Ante* at 20; *see, also, ante* at 21 n 53.[4]

III. *NIX* IS CONTROLLING PRECEDENT

Except for the composition of this Court, little has changed since the aforementioned principles were

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establish [a defendant's] factual guilt" is an acquittal under the Double Jeopardy Clause); *Anderson*, 409 Mich at 486 (same).

[4] The *Nix* Court is not the only court to hold that it makes no difference for double-jeopardy purposes whether the trial court ruled that there was insufficient evidence related to a required element of the offense or whether there was insufficient evidence related to an erroneously added element. *See Carter v. State (On Remand)*, 365 Ark 224, 228-229; 227 SW3d 895 (2006) (holding that, under *Smith*, regardless of a trial court's legal error, the trial court's determination that there was a lack of evidence on the charged offense resulted in an acquittal for double jeopardy purposes and, in so holding, rejecting the state's argument that *Smith* was "distinguishable" because, "unlike in *Smith*, where the trial judge ruled that proof of a *required* element of the charged offense was lacking," in *Carter* "the State was required to prove an *additional* element that the statute [did] not require").

articulated in *Nix* well over a decade ago. Yet today the majority effectively overrules *Nix* without persuasively explaining why *Nix* and the United States Supreme Court decisions on which *Nix* was based should no longer control.[5] It is therefore clear that the current majority's rationale is simply based on its unstated, yet apparent, preference for the approach advanced by the *Nix* dissent and *United States v. Maker*, 751 F2d 614 (CA 3, 1984) – approaches that the *Nix* majority properly rejected as unpersuasive.[6]

Further, I disagree with the majority's implicit conclusion that *Nix*, when viewed in its totality, does not control the outcome of this case. Rather, notwithstanding the majority's apparent conclusion to the contrary, *Nix* addressed the situation presented in this case when it stated that a trial court's determination that the evidence is insufficient to sustain

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[5] This is not the first time that this Court has been asked to reconsider *Nix*. *See, e.g., People v. Limmer*, 461 Mich 974 (2000); *People v. Robinson*, 470 Mich 874 (2004) (granting leave to appeal to consider whether *Nix* was "properly decided"), vacated 473 Mich 878 (2005). Thus, this Court has had the opportunity to review the aforementioned precedents on at least two other occasions, yet decided not to overrule *Nix*. I would continue this practice of adhering to *Nix* because, as noted, *Nix* is consistent with United States Supreme Court precedent.

[6] Although it is apparent that the majority's opinion is influenced by *Maker*, the majority fails to explain why *Maker* should now govern despite *Nix*'s rejection of it more than a decade ago. Notably, it does not appear that *Maker* even addressed United States Supreme Court precedent, such as *Sanabria*, regarding the effect of legal errors leading to a judgment of acquittal.

a conviction constitutes an acquittal for double-jeopardy purposes and "precludes appellate inquiry into [the ruling's] legal correctness," *Nix,* 453 Mich at 627, regardless of "whether 'the acquittal was based upon an egregiously erroneous foundation' . . . or not," *id.* at 631 (citation omitted); *see, also, id.* at 624-627; *Anderson,* 409 Mich at 483, 486. Thus, in my view, the majority errs by failing to consider *Nix* in its totality and, in selectively quoting *Nix,* conveniently turns a blind eye to the doctrine of stare decisis.

Even assuming arguendo that the majority is correct in classifying selected portions of *Nix* as dicta, the majority's sudden decision to classify those portions of *Nix* as such stands in stark contrast to the majority's treatment of *Nix* as "controlling" precedent and "compelling reversal" just two terms ago in a case that considered the exact issue raised in this appeal. Specifically, in *Szalma,* the majority explained that "this Court's decision in *Nix* provides that a trial court's erroneously added element of a crime does not negate the finality of its directed verdict," *Szalma,* 487 Mich at 725, because a trial court's "acquittal on the merits of the charged offense is final under the holding of *Nix;*" *id.* at 722; *see, also, id.* at 726 (stating that "[t]his Court held in . . . *Nix* that an acquittal retains its finality . . . even when 'the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense'" and the "Court of Appeals erred by ruling otherwise"), quoting *Nix,* 453 Mich at 628; *Szalma,* 487 Mich at 727 (stating that the "trial court's decision . . . , though

premised on an erroneous understanding of the legal elements of the charged offense, nonetheless constituted . . . a decision on the sufficiency of the evidence under *Nix*"). In so stating, the *Szalma* majority accurately explained that "*Nix* holds that such legal error precludes retrial," *id.* at 710, that "*Nix* squarely compels a reversal," *id.*, and that "this Court's decision in *Nix* clearly controls the outcome of this case," *id.* at 720 n 21. In light of the *Szalma* majority's treatment of *Nix* as controlling precedent, I find the majority's newfound conclusion that *Nix* is not binding precedent, and its attempts to distinguish *Szalma*'s treatment of *Nix* as such, both contradictory and disingenuous.

IV. CONCLUSION

The new standard that the majority opinion adopts today effectively overrules *Nix* without a persuasive explanation of why *Nix* and the United States Supreme Court precedent on which it was founded should no longer control. In obfuscating these precedents and creating distinctions that simply do not appear to exist, the majority dismisses the fact that whether a trial court erred in its interpretation of the elements of the crime is irrelevant: the essential character of an acquittal is not altered, even if the acquittal results from "erroneous interpretations of governing legal principles. . . ." *Smalis,* 476 US at 144 n 7 (citations and quotation marks omitted). Because the United States Supreme Court has rejected "*any contention* that the Double Jeopardy Clause must

itself . . . leave open a way of correcting legal errors," *Smith*, 543 US at 473 (emphasis added), I dissent from the majority's decision to summarily disregard *Nix* and the controlling precedent on which *Nix* is based. Accordingly, I would reverse the judgment of the Court of Appeals.

Michael F. Cavanagh
Marilyn Kelly

HATHAWAY, J. (*dissenting*).

I dissent from the majority's decision because I disagree with the distinction that the majority draws between a trial court's erroneous ruling related to a required element of an offense and a trial court's erroneous ruling related to a mistakenly added element of an offense. The United States Supreme Court has explained that, for purposes of double jeopardy, a reviewing court must "determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[1] Further, I believe that *People v. Nix*, 453 Mich 619; 556 NW2d 866 (1996), controls this case. Accordingly, I would reverse the judgment of the Court of Appeals.

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[1] *United States v. Martin Linen Supply Co.*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977).

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellant, v LAMAR EVANS, Defendant-Appellee.	FOR PUBLICATION May 13, 2010 9:10 a.m. No. 290833 Wayne Circuit Court LC No. 08-013567-FH Advance Sheets Version

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

O'CONNELL, J.

The prosecution appeals as of right the trial court's order granting defendant's motion for a directed verdict and dismissing the case. We reverse and remand.

Defendant was charged with burning other real property. MCL 750.73 provides:

> Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years.

MCL 750.72, which concerns burning a dwelling house, provides:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 20 years.

Defendant was seen carrying a gasoline can and running away from a burning house. An arson investigator testified that he observed burn patterns that indicated that a flammable liquid had been used to ignite the fire. The investigator noted that the home lacked gas, electricity, and water. The homeowner testified that he was in the process of purchasing the home, which needed repairs, and that he and his family had moved some belongings into the home.

At the close of the prosecution's proofs, defendant moved for a directed verdict. Defendant noted that the crime with which he was charged pertained to the burning of property other than a dwelling house and argued that the prosecution had not established that the building that burned was not a dwelling house. Defendant referred the trial court to CJI2d 31.3, Burning Other Real Property, which provided before its amendment in September 2009:

> (1) [The defendant is charged with the crime of / You may also consider the lesser

charge of] burning a building or any of its contents. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant burned [*describe property alleged*]. The term "burn" in this case means setting fire to or doing anything that results in the starting of a fire, or helping or persuading someone else to set a fire. If any part of the [*describe property*] is burned, [no matter how small,] that is all that is necessary to count as a burning; the property does not have to be completely destroyed. [The (*describe property*) is not burned if it is merely blackened by smoke, but it is burned if it is charred so that any part of it is destroyed.]

(3) Second, that the property that was burned was a building or any of its contents. [It does not matter whether the defendant owned or used the building.]

(4) Third, that when the defendant burned the building or its contents, [he/she] intended to burn the building or contents or intentionally committed an act that created a very high risk of burning the building or contents and that, while committing the act, the defendant knew of that risk and disregarded it.

[(5) Fourth, that the building was not a dwelling house. A dwelling house is a structure that is actually being lived in or that

> could reasonably be presumed to be capable of being lived in at the time of the fire. (A business that is located very close to and used in connection with a dwelling may be considered to be a dwelling.)][1]

Defendant sought a directed verdict of acquittal on the ground that the prosecution had failed to produce any evidence to establish that the building that burned was not a dwelling house. The trial court made the following determination on the record, reproduced here in its entirety:

> *The Court*: The Court does not have an option of not reading all of the required elements in a jury instruction, and there are no optional elements in [CJI2d] 31.3. All of them are required. And the instructions are not a guide. They are what is required by law.
>
> Looking at the commentary, it refers to a distinction between [CJI2d] 31.2 and 31.3. [CJI2d] 31.2 is the instruction that is required for burning a dwelling house.
>
> The commentary, speaking of CJI 2nd 31.1 [sic, 31.3], Burning Other Real Property, the commentary: "This offense is similar to the one described in CJI 2nd 31.2, except

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[1] A use note indicates that paragraph (5) "should be used when instructing on the crime as a lesser included offense of burning a building."

that an essential element is that the structure burned is not" – which is in italicized writing print – "a dwelling house." And then it cites *People v. Antonelli,* A-n-t-o-n-e-l-l-i, 64 Mich App 620, 238 NW 2nd 363 [1975], and notes that it was reversed on other grounds, and gives the citation as 66 Mich App 138, 238 NW 2nd 551 (1975).

And the commentary goes on to say: "As the Court explained on rehearing, common law arson required that the building be a dwelling. In creating the less serious crime of burning buildings other than dwellings, the legislature simply eliminated the element of habitation. Other real property is all real property not included in MCL 750.72."

And the People in this case have relied on MCL 750.73, which specifically says it cannot be a dwelling.

[*The Prosecutor*]: Judge, could I have a moment to go upstairs and pull the statute and make sure that the statute addressed that. Because my understanding of the law is that it doesn't matter whether it's a dwelling or not, it just has to be a structure. And that's the reason for the –

The Court: Other than a house, because the legislature has imposed a higher penalty for one burning a house.

[MCL] 750.73 reads: "Burning of Other Real Property – Any person who willfully or maliciously burns any building or other real

property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony . . . [.]" I won't give the term of punishment.

And it says: "Other than those specified in the next preceding." Isn't preceding before? The next preceding section of this chapter would be [MCL] 750.72.

[MCL] 750.72 is entitled "Burning Dwelling House," and reads: "Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by him or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony." I will not read the term of punishment, but it is twice that which is specified in [MCL] 750.73.

So reading the language of [MCL] 750.73, which refers back to [MCL] 750.72, a dwelling house, either occupied or unoccupied, is excluded by law.

[*The Prosecutor*]: Judge, may I have a moment to go upstairs and consult with my supervisors?

The Court: You can consult with them when you tell them I've granted the motion.

[*Defense Counsel*]: Thank you, Judge.

The Court: As a matter of law.

The testimony was this was a dwelling house, paid for for [sic] forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter.

Motion granted.

On appeal, the prosecution argues that the trial court erroneously granted defendant's motion for a directed verdict because the prosecution was not required to prove that the burned building was not a dwelling house and that the principles of double jeopardy do not bar a retrial because the trial court's dismissal of the case did not constitute a directed verdict of acquittal for double jeopardy purposes. We agree.

We review a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecution, viewed in a light most favorable to the prosecution, could persuade a rational fact-finder that the essential elements of the offense were proved beyond a reasonable doubt. *People v. Couzens,* 480 Mich 240, 244; 747 NW2d 849 (2008). The applicability of the Double Jeopardy Clause presents a question of law that we review de novo. *People v. Herron,* 464 Mich 593, 599; 628 NW2d 528 (2001).

It is undisputed that the trial court misperceived the elements of the offense with which defendant was

charged and erred by directing a verdict.[2] In *People v. Antonelli* (*On Rehearing*), 66 Mich App. 138, 140; 238 NW2d 551 (1975), this Court concluded that the crime of burning other real property (i.e., property that is not a dwelling) is a lesser included offense of the crime of burning a dwelling. The *Antonelli* Court noted, "The necessary elements to prove either offense are the same, except to prove the greater it must be shown that the building is a dwelling; to prove the lesser it is not necessary to prove that the building is not a dwelling." *Id.* In this case, the trial court examined CJI2d 31.3 and concluded from the language of paragraph (5) that it must be proved that the building is not a dwelling in order to establish the offense of burning other real property.[3] However, as noted, paragraph (5) is read only when the offense of burning other real property is considered as a lesser included offense of the crime of burning a dwelling. The crime of burning other real property was not charged as a lesser included offense in this case.[4]

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[2] Even defendant admitted in his brief on appeal that the trial court's directed verdict of acquittal was "technically incorrect."

[3] Interestingly, paragraph (5) was removed from the latest version of this jury instruction, amended in September 2009.

[4] We note that the trial court's stated belief that it was required by law to rely on the Michigan Criminal Jury Instructions to determine the elements of the offense of burning other real property was incorrect. The Michigan Criminal Jury Instructions are simply provided as guidance for trial courts for the purpose of instructing a jury. In fact, a trial court is not even required to use the Michigan Criminal Jury Instructions when

(Continued on following page)

The trial court incorrectly determined that proof that the burned building was not a dwelling is an element of the charged offense and directed a verdict of acquittal on the ground that the prosecution had failed to present evidence of that nonelement. Defendant argues that the trial court's order granting a directed verdict, though erroneous, constituted an acquittal for double jeopardy purposes, barring a retrial. We disagree.

The double jeopardy clauses of the United States and Michigan constitutions prevent a defendant from being prosecuted twice for the same offense. US Const Amend V; Const 1963, art 1, § 15. If a trial court directs a verdict of acquittal on a charge, the double jeopardy provisions prohibit further proceedings on

---

instructing the jury. In *People v. Vaughn,* Justice BRICKLEY explained:

> The Michigan Criminal Jury Instructions do not have the official sanction of this Court, and their use is not mandatory but, instead, remains discretionary with the capable trial judges of this state. . . . Trial judges remain free to use all or part of those standardized instructions that they deem proper for adequately instructing a jury, and should not hesitate to modify or disregard a standard instruction when presented with a clear or more accurate instruction. [*People v. Vaughn,* 447 Mich 217, 235 n. 13; 524 NW2d 217 (1994) (opinion by BRICKLEY, J.), reh den 447 Mich 1202 (1994), repudiated on other grounds *People v. Carines,* 460 Mich 750; 597 NW2d 130 (1999) (citations omitted).]

that charge. *People v. Nix,* 453 Mich 619, 626-627; 556 NW2d 866 (1996). Specifically, "[a] defendant may not be retried after an acquittal that is granted on the basis of insufficient evidence." *People v. Mehall,* 454 Mich 1, 5; 557 NW2d 110 (1997). Whether a trial court's decision constitutes a verdict of acquittal depends on "'whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Nix,* 453 Mich at 625, quoting *United States v. Martin Linen Supply Co.,* 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). "'There is an acquittal and retrial is impermissible when the judge "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction."'" *Nix,* 453 Mich at 626, quoting *People v. Anderson,* 409 Mich 474, 486; 295 NW2d 482 (1980), quoting *Martin Linen,* 430 US at 572.

In *Nix,* the majority made an additional observation in response to the dissent's concerns that the trial court had improperly determined that the prosecutor had failed to establish that the defendant had a legal duty to aid the murder victim, stating:

> The dissent appears to read the *Martin Linen* standard as if the phrase "correct or not" refers to the factual truth of the prosecution's evidence, a determination completely outside the trial court's purview in a jury trial when considering a defendant's motion for directed verdict. When ruling on a motion

> for directed verdict, a trial court must, as this trial court did, view the prosecution's evidence in the light most favorable to the prosecution. Accordingly, the trial court cannot make an erroneous factual resolution. The phrase "correct or not" refers to all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense. As discussed below, however, it is not clear that this situation even exists in the case at bar. [*Nix*, 453 Mich at 628.]

Admittedly, the majority's observation indicated that it believed that the Double Jeopardy Clause precludes retrial of a defendant if charges against him are dismissed because the prosecution failed to establish a nonelement of the charged offense. In *People v. Howard,* unpublished opinion per curiam of the Court of Appeals, issued December 23, 2003 (Docket No. 240915), a panel of this Court discussed the illogic of such a position:

> Statements in *Nix*, albeit arguably dicta, could be read to mean that the double jeopardy clause applies to acquittals resulting from "egregiously erroneous" determinations that "a particular factor is an element of the charged offense." *Nix*, [453 Mich] at 625, 628. Thus a double jeopardy bar would prevent retrial of a defendant acquitted by a judge who concluded that the offense charged had

> as one of its elements that the moon is made of green cheese and that, the prosecutor having failed to prevent [sic] any evidence to that effect, a directed verdict was required. To state such a result is to show the deficiencies of the rule that would even arguably allow it. That rule certainly does not assure that the double jeopardy clause operates in a manner that, while preventing the retrial of factual issues properly determined in favor of a defendant, nonetheless allows the public "its valued right to have one complete opportunity to vindicate its laws." *Id.* at 642. (J Boyle, dissenting). [*Id.* at 2 n 2.]

In addition, we note that the majority in *Nix* recognized that its interpretation of the phrase "correct or not" was dicta, acknowledging that it was unclear whether the situation that concerned the dissent, that dismissal of the case was premised on the prosecution's failure to establish a nonelement of an offense, had even occurred.[5] *Nix,* 453 Mich at 628. *See also People v. Case,* 220 Mich 379, 382-383; 190 N.W. 289 (1922) ("It is a well-settled rule that any statements and comments in an opinion concerning some

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[5] Instead, the majority in *Nix* noted that "in granting defendant's motion for directed verdict, the trial judge considered all the factual evidence proffered by the prosecution and concluded that that factual evidence, as a matter of law, was insufficient to permit the jury to convict defendant of the charges brought. . . ." *Nix,* 453 Mich at 628-629.

rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but *obiter dicta* and lack the force of an adjudication.").

Yet, coincidentally, the acknowledgement by the majority in *Nix* that this determination was not intrinsic to its holding in *Nix* frees us to consider the discussion by the dissenters in *Nix* concerning the proper application of the Double Jeopardy Clause in such circumstances. The dissent in *Nix* wrote:

> [A] judicial ruling is an acquittal "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element *necessary for a criminal conviction.*" *United States v. Maker,* 751 F2d 614, 622 (CA 3, 1984), cert den 472 US 1017 (1985) (emphasis added). Thus, as Professor Wright's treatise has construed the Court's jeopardy jurisprudence, "[s]o long as there has not been a finding against the government on any issue of fact required to establish guilt on the correct legal theory, appeal could easily seem appropriate." 15B Wright, Miller & Cooper, Federal Practice & Procedure (2d ed), § 3919.5, p. 662.
>
> In *Maker,* the defendants were charged with a single insurance fraud scheme related to two separate automobile accidents. The district court concluded that the statute required advanced planning of the second accident at the time of the first and dismissed

the charge during trial on the basis of the insufficiency of the government's evidence to prove one scheme rather than two. Finding this to be an "element of" the government's case, the trial court decided that the government did not have "sufficient evidence" to prove this "element." *Maker* [751 F2d] at 619. While acknowledging that the United States Supreme Court did not provide significant direction on how the test should be applied, *id.* at 622, the United States Court of Appeals for the Third Circuit read *Martin Linen* and its progeny, [*United States v. Scott,* 437 US 82; 98 S Ct 2187; 57 L Ed 2d 65 (1978)], to require an acquittal only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of "*a factual element necessary for a criminal conviction.*" *Maker* [751 F2d] at 622. (Emphasis added.) As in the case before us, the trial court had dismissed the charge because the government had not alleged facts sufficient to prove all the legal elements that it believed were necessary to sustain conviction. Likewise, as in the case before us, the court then made what is "at least arguably, a factual determination," that the government could not prove the legal element which the trial court thought necessary for conviction. *Id.* at 623.

The court found that the trial court's arguable factual finding did not "actually determine in [the defendant's] favor any of the essential elements of the crime with which

he was charged," because the trial court's legal determination about the elements of the charge was incorrect. *Id.* The court reasoned:

> "Our conclusion that an appeal is not barred in this case is consistent with the policies underlying the double jeopardy clause. This is not a case in which a second trial is permitted 'for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' *Burks v. United States,* 437 US 1, 11; 98 S Ct 2141, 2149; 57 L Ed 2d 1 (1978). Instead, this is a case in which the district court, as the result of a legal error, determined that the government could not prove a fact that is not necessary to support a conviction. To preclude an appeal in this case would deprive the public of 'its valued right to "one complete opportunity to convict those who have violated its laws."' *Scott,* [437 US] at 100, quoting *Arizona v. Washington,* 434 US 497, 509; 98 S Ct 824, 832; 54 L Ed 2d 717 (1975)." [*Maker,* (751 F2d) at 624.]
>
> The district court had come to two conclusions, one legal and the other apparently factual. Appeal and retrial were not barred, however, because neither was relevant to an essential element of the charge. [*Nix,* 453 Mich at 633-636 (BOYLE, J., dissenting).]

We find the analysis provided by the dissent in *Nix,* and the dissent's reliance on *Maker,* to be persuasive and adopt this position. Accordingly, we conclude that

an actual acquittal occurs, for double jeopardy purposes, "only when the trial court's action, whatever its form, is a resolution in the defendant's favor, correct or not, of a factual element necessary for a criminal conviction." *Id.* at 634-635 (emphasis, citation, and quotation marks omitted).

In this case, we conclude that the trial court's order granting a directed verdict in favor of defendant does not constitute an acquittal for double jeopardy purposes, because the trial court failed to resolve any of the elements that actually must be satisfied to establish the offense of burning other real property. Again, the basis for a trial court's grant of a directed verdict is determined by examining "the substance of the decision. . . ." *Mehall,* 454 Mich at 5. The trial court's written order was a standardized form and indicated only that defendant's motion for a directed verdict of acquittal was granted. However, the trial court's remarks made at the time defendant moved for a directed verdict indicated that it granted a directed verdict because the court erroneously believed that an element of the charged offense of burning other real property is that the property burned was not a dwelling. The trial court then improperly concluded that the prosecution did not present evidence to establish this nonelement and granted defendant's motion for a directed verdict of acquittal as a matter of law. The trial court never addressed any of the *actual* elements of burning other real property when granting the directed verdict, instead basing the

directed verdict entirely on a determination that the prosecution had failed to establish a nonelement.

The trial court's ruling did *not* constitute a resolution of some or all of the factual elements of the offense of burning other real property. It was premised, instead, on an error of law: the trial court ordered a directed verdict because it believed that the prosecution was required to establish that the building in question was not a dwelling, when the applicable statute and relevant caselaw make it quite clear that no such element must be satisfied. The trial court's ruling constituted nothing more than a determination that the prosecution had failed to provide sufficient evidence to establish a factor that is *not* an element of the charged offense, premised on an incorrect legal determination regarding the elements that needed to be established. In fact, no resolution regarding the *actual* elements of the charged offense was even made. The trial court never mentioned any actual element of the charged offense in its discussion of the directed verdict, nor did it discuss any evidence presented by either party except that which, in the court's mind, conclusively established that the burned building was a dwelling. Because the trial court never resolved, or even addressed, a factual element necessary to establish a conviction for burning other real property, and instead based the directed verdict solely on the determination that the prosecution had failed to present any evidence establishing a nonelement of the offense, double jeopardy principles do not preclude further prosecution of the charged offense.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder

State of Michigan
Third Judicial Circuit Court
(Wayne County)
Criminal Division

The People of the
State of Michigan

v File No. 08-13567

Lamar Evans,

Defendant.

Jury Trial
Before the Honorable Deborah A. Thomas, Judge
Detroit, Michigan – Monday, February 23, 2009

* * *

[86] MR. SCHARG: Judge, thank you.

Pastor Evans is charged with burning of real property. The burning of real property means to the exclusion of burning an occupied or unoccupied dwelling.

In the jury instructions that you have to read to the jury, the fourth element of the offense is that the building was not a dwelling house. A dwelling house is a structure that is actually being lived in, or that could reasonably be presumed to be capable of being lived in at the time of the fire.

Testimony in this case has been unequivocable from Lieutenant Smith, who says that they were

living in the house "by my standard," and by Mr. DeMoss who said he was living in the house.

Based upon the testimony, undisputed, that in fact this house was an occupied or an unoccupied dwelling, that –

THE COURT: Occupied or unoccupied? What are you saying?

MR. SCHARG: It was that it was a dwelling. It doesn't have to – either one. It's either an occupied or an unoccupied dwelling. The dwelling is a structure – this is from the instructions – that is actually being lived in, or that could reasonably be [87] presumed to be capable of being lived in at the time of the fire.

Based upon the testimony, and only testimony in this case was from Lieutenant Smith, that in his only – the only testimony on that was, he said there was someone living in the house "by my standard," and based upon Mr. Demoss's testimony.

Clearly, that using the standard for a directed verdict, a directed verdict motion of judgement of acquittal must be granted if the prosecution fails to prevent sufficient evidence of guilt on all elements of the offense.

That in determining whether a conviction is supported by constitutionally sufficient evidence, the Court must apply the following standard: The real Court must consider whether there was evidence to support the conviction – not consider whether there

was any evidence to support the conviction, but whether there was sufficient evidence to justify a reasonable trier of fact in finding guilt beyond a reasonable doubt.

Based upon the evidence in this case, clearly, the prosecution charged burning of real property. It has attempted to establish only evidence that this was an occupied dwelling under the provisions [88] of Section – I believe it was 750.72.

Pastor Evans is charged under 750.73, which is burning of real property. And it is clear and distinct from the burning of an occupied dwelling, of a house, under 750.72; and the distinction is made further in 750.74. And the Court's instructions, the jury instructions indicate that a necessary element is that the building was not a dwelling house, or it could be reasonably presumed to have somewhat capable of being lived in at the time of the fire.

Again, the only evidence in this case is that this was an occupied dwelling, or that it was capable of being lived in.

THE COURT: Okay. I don't know that I understand what the distinction is you're trying to make.

There was testimony in the case that it was a structure identified as a house, that there was no water in the house, and that the electricity and the gas was disconnected. That it was in need of repair, and that they had purchased a land contract. But

that they had put in some small appliances, but that they were not prepared to move into the house because of the work that needed to be done.

So what are you asking me?

[89] MR. SCHARG: Oh, that wasn't the – that was the – I don't believe the testimony was that they weren't prepared to move in. That's not what he – I don't believe that's what he said. He said they were moving into the house. They already had occupancy.

THE COURT: They were in the process of moving in the house with small appliances.

MR. SCHARG: Yes.

THE COURT: All right. There was also testimony there was no water, no gas, no electric.

MR. SCHARG: The only testimony was from the expert witness who was the – not the expert witness, but the officer-in-charge whose fire department who indicates that the house was capable of being lived in. In his testimony, specifically –

THE COURT: So what are you asking this Court to do?

MR. SCHARG: To grant a directed verdict in this case because they –

THE COURT: Of what?

MR. SCHARG: A directed verdict of acquittal.

THE COURT: Because . . .

MR. SCHARG: Because – because when you charge this jury, the fourth element is that the building was not a dwelling house. That a dwelling [90] house is a structure that is actually being lived in, or that could reasonably be presumed to be capable of being lived in at the time of the fire.

The People – the People have to prove that it was not a building house. It was not a house. They have taken the contrary stand and trying to establish that it was a house.

THE COURT: Give me the citation for the instruction upon which you rely.

MR. SCHARG: Well, it's CJI 2nd 31.3, which is the instruction to be given to this jury.

THE COURT: 31.3?

MR. SCHARG: Yes.

THE COURT: And you're looking at parens which?

MR. SCHARG: Five, which is the fourth element of the offense.

THE COURT: You wish to be heard?

MS. DODDAMANI: Yes, your Honor.

First of all, I don't believe that 750.73 requires that this be a dwelling or not a dwelling. The charge is arson of real property. Whether it's a dwelling, whether it's occupied, whether it's lived in doesn't matter for the purposes of the statute; only that a structure or building is burned.

[91] Now, I understand the Court is looking at 31.3, which I believe this fourth element, as counsel is terming it, is not necessary to read to the jury. And furthermore, Judge, this jury instruction is editable. These are only meant to be guides.

And I believe if you look in the statute, you will not find anything about it being a dwelling or not a dwelling, or being occupied, or having to prove anything about that.

MR. SCHARG: 31.3 is not optional, Judge, under the jury instructions. It's not in the alternative and it's not optional. It's the fourth element of the offense.

MS. DODDAMANI: Judge, there's nothing in the statute that says anything about that. I can pull the statute if the Court wants.

THE COURT: The Court does not have an option of not reading all of the required elements in a jury instruction, and there are no optional elements in 31.3. All of them are required. And the instructions are not a guide. They are what is required by law.

Looking at the commentary, it refers to a distinction between 31.2 and 31.3. 31.2 is the instruction that is required for burning dwelling house.

[92] The commentary, speaking of CJI 2nd 31.1, Burning Other Real Property, the commentary: "This offense is similar to the one described in CJI 2nd 31.2, except that an essential element is that the structure burned is not – which is in italicized writing print – "a dwelling house." And then it cites People v Antonelli, A-n-t-o-n-e-l-l-i, 64 Mich App 620, 238 NW 2nd 363, and notes that it was reversed on other grounds, and gives the citation as 66 Mich App 138, 238 NW 2nd 551 (1975).

And the commentary goes on to say: "As the Court explained on rehearing, common law arson required that the building be a dwelling. In creating the less serious crime of burning buildings other than dwellings, the legislature simply eliminated the element of habitation. Other real property is all real property not included in MCL 750.72."

And the People in this case have relied on MCL 750.73, which specifically says it cannot be a dwelling.

MS. DODDAMANI: Judge, could I have a moment to go upstairs and pull the statute and make sure that the statute addressed that. Because my understanding of the law is that it doesn't matter whether it's a dwelling or not, it just has to be a structure. And [93] that's the reason for the –

THE COURT: Other than a house, because the legislature has imposed a higher penalty for one burning a house.

750.73 reads: "Burning of Other Real Property – Any person who willfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony . . . " I won't give the term of punishment.

And it says: "Other than those specified in the next preceding." Isn't preceding before? The next preceding section of this chapter would be 750.72.

750.72 is entitled "Burning Dwelling House," and reads: "Any person who willfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by him or another, or any building within the curtilage of such dwelling house, or the contents thereof, shall be guilty of a felony." I will not read the term of punishment, but it is twice that which is specified in 750.73.

So reading the language of 750.73, which [94] refers back to 750.72, a dwelling house, either occupied or unoccupied, is excluded by law.

MS. DODDAMANI: Judge, may I have a moment to go upstairs and consult with my supervisors?

THE COURT: You can consult with them when you tell them I've granted the motion.

MR. SCHARG: Thank you, Judge.

THE COURT: As a matter of law.

The testimony was this was a dwelling house, paid for for forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter.

Motion granted.

(At 11:35 a.m., proceedings concluded.)

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT COURT	ORDER DENYING/ GRANTING MOTION	CASE NO. 08-13567

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Lamar Evans
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice at Detroit in Wayne County on 2/23/09

PRESENT: Honorable Deborah Thomas
Judge

A Motion for _____ _____ having been filed; and the People having filed an answer in opposition; and the Court having reviewed the briefs and the case and being fully advised in the premises;

IS ORDERED THAT the Motion for Directed verdict of Acquittal be and is hereby ☐ denied ☒ granted.

/s/ Deborah Thomas
Judge

OPPOSITION BRIEF

RECORD
AND
BRIEFS

11-1327

FILED
MAY 8 - 2012
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2012
No. 11-1327

LAMAR EVANS,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent.

On Petition for Writ of Certiorari
To The Michigan Supreme Court

Answer to Petition For Writ of Certiorari

KYM L. WORTHY
Wayne County Prosecuting Attorney

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Statement Of The Question

I.

A directed verdict—or "judicial acquittal" in a jury trial—is a resolution, correct or not, of one or more of *the elements* of the offense. Did the Michigan Supreme Court correctly hold that no acquittal results—and consequently no double jeopardy bar to retrial obtains—when the trial court, at the urging and argument of the defense and over the opposition of the prosecution, aborts a trial by resolving against the prosecution a fact that is unmistakably *not* one of the elements of the offense?

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Statement of the Case

At trial defense counsel argued that the wrong charge had been brought. He argued that "the burning of real property means to the exclusion of burning an occupied or unoccupied dwelling." (record, III, 86). Because there was some evidence that the owners of the structure were living in the house, there was insufficient proof of burning real property, (record, III, 87), because an element, argued counsel, of burning real property "is that the building was not a dwelling house....the only evidence in this case is that this was an occupied dwelling, or that it was capable of being lived in" (record, III, 88). The trial court noted that the witness had said they were "in the process" of moving in, with small appliances, and that there was no water, gas, or electricity. (record, III, 89). Counsel asked for a directed verdict because "the fourth element is that the building was not a dwelling house....the People have to prove that it was not a building house" (record, III, 89-90). The prosecution argued that the statute (MCL 750.73) does *not* require that the building be or not be a dwelling, the statute itself not so requiring (record, III, 90-91). The prosecutor also noted that the standard criminal jury instructions (which defense counsel cited as to the "fourth element") are only guidelines.

The trial judge held that "there are not optional elements in 31.3. All of them are required. And the instructions are not a guide. They are what is required by law" (record, III, 91). Reading from the commentary to the jury instruction, the court noted that for this offense the "legislature simply

eliminated the element of habitation" (making it a less serious offense than arson of a dwelling) (record, III, 92). The trial judge stated that the statute, MCL 750.73, "Specifically says it cannot be a dwelling" (Appendix page 8; record, III, 92). The trial judge then purported to grant a "directed verdict" (record III, 94).

The Michigan Court of Appeals reversed, finding both that the trial judge's erred as a matter of law in requiring proof, as the defense urged, that the structure was not a dwelling, there being no such element, and that double jeopardy did not bar retrial, there being no "acquittal" of any sort.[1] The Michigan Supreme Court reached the same conclusions: "We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred."[2] Petitioner has now filed for certiorari.

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[1] *People v Evans*, 288 Mich.App 410, 794 N.W.2d 848 (2010).

[2] *People v Evans*, 491 Mich. 1, __N.W.2d__ (2012).

Reasons the Writ Should Be Denied

I.

A directed verdict or judicial acquittal in a jury trial is a resolution, correct or not, of one or more of the elements of the offense. As a matter of state law, the offense of burning a building or other structure unquestionably does not have as an element that the structure was *not* a dwelling. Double jeopardy does not preclude retrial after a trial court's purported "directed verdict," entered on defendant's motion, which finds that the prosecution has failed to prove a non-element, or, put another way, a "faux" element.

A. Introduction

One thing is clear in this case—no defense wish to have this case determined by the jury was thwarted, the defense seeking—successfully—to *avoid* a jury resolution of the case by having the trial judge take it from the jury. Petitioner had no interest in his "valued right to have his trial completed by a particular tribunal,"[3] but *sought* its termination, and by urging upon the trial court the erroneous enumeration of the elements of the offense that the trial court accepted. The case involves, then, no attempt to harass the defendant through repeated prosecutions, as all the the

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[3] See e.g. *Gori v. United States*, 367 U.S. 364, 371, 81 S.Ct. 1523, 1527 (1961).

People sought and seek is one full and fair opportunity to have the case decided by a jury.

B. "Judicial Acquittals" In Jury Trials and the Protection Against Double Jeopardy

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of autrefois acquit and autrefois convict. Blackstone stated that:

> ...the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly* found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.[4]

Blackstone also observed that the:

> ...plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon

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[4] 4 Blackstone's Commentaries 335.

> the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime....[5]

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal."[6]

This tradition of the pleas in bar of autrefois acquit and autrefois convict, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists.[7] New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."[8] Courts in other states also recognized this form of plea in bar.[9] This rich history was thus before the First Congress which proposed the Bill of

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[5] 4 Blackstone's Commentaries at 329-331.

[6] See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

[7] See e.g. the Massachusetts Body of Liberties of 1641.

[8] N.H. Const, art I, sec. 16 (1784).

[9] See 26 Am Crim L Rev at 1480-1481.

rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence...."[10] The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial even where sought by the defendant on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment jeopardy clause, referring, significantly, to *one jeopardy*, rather than *one trial*.[11]

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[10] 1 Annals of Cong 434.

[11] Indeed, for this reason—the use of "jeopardy" rather than "trial"—no less a luminary than Justice Oliver Wendell Holmes believed that acquittals were reviewable for error. See Holmes, dissenting, in *Kepner v. United States*, 195 U.S. 100, 134-135, 24 S.Ct. 797, 806 - 807 (1904): "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny.. . . it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause. Everybody agrees that the principle in

Thus, our jeopardy clause is an amalgam of common law pleas in bar, which required an actual judgment in a prior proceeding before the bar could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double jeopardy clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him*."[12] The historical underpinning of the jeopardy protection, then, with regard to acquittals, is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of

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its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. . . . If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm."

[12] Story, 3 *Commentaries on the Constitution* (1833) § 1781, p. 659 (emphasis added).

anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[13]

The development of the modern doctrine of "judicial acquittals" began in the early 1960's with *Fong Foo v United States*.[14] There a corporation and two of its employees were brought to trial for conspiracy, as well as a substantive offense. After seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all respondents, and a formal judgment of acquittal was entered. The trial judge's action was based on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. The Supreme Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the verdict of acquittal was "final and could not be reviewed." In its per curium opinion, which stretches to amount to a page and one half, the Court reached this conclusion without any analysis of whether a "judgment of acquittal" either entered or ordered by the trial judge, rather

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[13] *Green v United States*, 355 US 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

[14] *Fong Foo v United States*, 369 US 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

than reached by the jury through its own deliberations, falls within the protections of the double jeopardy clause as the scope and purpose of that clause are revealed in history.

Fong Foo was followed and elaborated upon in what is now the lead case, *United States v Martin Linen Supply*,[15] central to the question here. A judgment of acquittal was entered on defense motion after the jury had been discharged because of an inability to agree. Focusing on the jeopardy interest against the prevention of multiple trials, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result in "another trial." 51 L Ed 2d at 650. Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then defined as "a resolution, correct or not, of some or all of the factual elements of the offense charged"(in the context of what might be called a "judicial acquittal" by the entry of a directed verdict of acquittal).[16]

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[15] *United States v. Martin Linen Supply Co*, 430 U.S. 564, 571, 97 S Ct 1349, 51 L.Ed.2d 642 (1977).

[16] Westen and Drubel, in "Toward A General Theory of Double Jeopardy," 1978 Sup Ct Rev 81 (1979) take the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by

In the present case, the offense of burning a building or other structure does not have as an element that the structure was *not* a dwelling. When defendant moved for a directed verdict on this ground the prosecution argued that the statute (MCL 750.73) does not require that the building be proven to be other than a dwelling. (III, 90-91). The prosecutor also noted that the standard criminal jury instructions (which defense counsel cited as to the "fourth element") are only guidelines. The trial judge held that "there are not optional elements in 31.3. All of them are required. And the instructions are not a guide. They are what is required by law" (III, 91). Reading from the commentary to the jury instruction, the court noted that for this offense the "legislature simply eliminated the element of habitation" (making it a less serious offense than arson of a dwelling) (III,

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hypothesis, it does not depend on an assessment of credibility or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a respondent's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be reviewed." Westen and Drubel, at 155. Respondent agrees that a directed verdict of acquittal is a ruling of law—and one which plainly might be mistaken, as if entered after a jury verdict of guilty the government may appeal and an appellate court may set aside the "judicial acquittal" as erroneous, restoring the jury verdict.

92). The trial judge stated that the statute, MCL 750.73, "Specifically says it cannot be a dwelling" (III, 92). The trial judge then granted a purported "directed verdict" (III, 94).

What occurred here, then, was *not* a directed verdict, as the Michigan Supreme Court properly held. "The trial court's characterization of its ruling is not dispositive, and what constitutes 'an acquittal' is not controlled by the form of the action."[17] A directed verdict constitutes a "judicial acquittal" when it is a determination that as to one or more of the *elements* of the offense, no rational jury could, on the evidence, find guilt proven beyond a reasonable doubt. The trial judge here put the burden of proof on the People on something that is *not* an element, and thus her decision could not have constituted a directed verdict as defined in *Martin Linen*.

Several cases from other jurisdictions illustrate the point. In *Commonwealth v Hosmer*,[18] a decision of the Massachusetts Court of Appeals, during the examination of the Commonwealth's first witness the prosecutor moved to amend the to reflect that the offense charged had occurred a day earlier than stated in the charging document. Defense counsel objected, and the judge denied the motion and terminated the trial. The Commonwealth acknowledged on appeal that the judge uttered, "not guilty," as he left the bench, and

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[17] *People v. Mehall*, 454 Mich. 1, 5 (1997).

[18] *Commonwealth v Hosmer*, 727 NE2d 537 (Mass App, 2000).

the District Court docket, by a check mark, recorded a finding of not guilty.[19]

The Court of Appeals agreed that "If there was a finding of not guilty, principles of double jeopardy prevent a retrial of the defendant on the same charge." But, said the court, "[i]n considering 'the exact nature of the action taken by the District Court judge,'. . . we are not bound by labels or checkmarks on a form, but we inquire whether there was a resolution of any of the facts that make up the offense charged. We conclude that the judge dismissed the Commonwealth's complaint, and that this was an abuse of discretion" for the "date is not an essential ingredient of the offense. . . ."[20] The court concluded that the trial judge, despite his characterization of his actions as an acquittal, had aborted the trial because "he thought there was a fatal variance between the facts and the complaint and he had determined not to permit an amendment of the complaint. The true nature of the judge's action, therefore, was to dismiss the complaint with prejudice in light of the defense objection,"[21] a dismissal the court found inappropriate given that there was "not even a hint of prejudice to the defendant flowing from a one-day change of date in the complaint."[22] Also, in

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[19] *Hosmer*, at 538.

[20] *Hosmer*, at 538, 539.

[21] *Hosmer*, at 539.

[22] *Hosmer*, at 539.

United States v Maker[23] the third circuit, pointing to several *post-Martin Linen Supply* decisions,[24] found that it was "generally understood" that the test to require an acquittal is "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction." Thus the appeal of the government in the case before it, the court concluded, was "barred only if the district court's legal determination about the elements of a single scheme conviction is correct."[25] Because that ruling was incorrect, the trial court misunderstanding the actual elements of the offense, the government appeal, and retrial, were not precluded by jeopardy.[26]

Similarly, in *State v. Korsen*[27] the State appealed a directed verdict of acquittal, and the Idaho Supreme Court framed the issues as first, "Did the magistrate err by granting Korsen's Rule

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[23] *United States v Maker*, 751 F.2d 614, 622 (CA 3, 1984).

[24] *Carter v. Estelle*, 677 F.2d 427, 452-53 (CA 5, 1982); *United States v. Dahlstrum*, 655 F.2d 971, 974 (CA 9, 1981); *United States v. Moore*, 613 F.2d 1029, 1037 (CA DC,1979); *Sedgwick v. Superior Court for the District of Columbia*, 584 F.2d 1044, 1049 (CA DC, 1978).

[25] *Maker*, at 622.

[26] *Maker*, at 623-624.

[27] *State v. Korsen* 69 P.3d 126 (Idaho,2003).

29 motion for acquittal based upon the State's failure to prove a legitimate reason for asking Korsen to leave the premises, when the statute has no such requirement as one of its elements?"; and second, "Is Korsen protected by double jeopardy principles from a retrial on the trespass charge?"[28] The court, citing the test of *Martin Linen Supply*, found that the lower court "as a result of legal error, determined that the government could not prove a fact that is not necessary to support a conviction," so that what had occurred was not an acquittal, and appeal and retrial were thus not barred.[29]

C. Conclusion

Petitioner argues that in *Maker* and in the Michigan Supreme Court decision here is created an "extra element exception" to the rule of *Martin Linen Supply* that cannot "withstand scrutiny." But it is petitioner's reading that cannot withstand scrutiny, as it makes the language employed in *Martin Linen Supply* utterly meaningless. This Court defined an acquittal with reference to the factual "elements" of the offense. Petitioner would have jeopardy bar retrial if the trial court resolves *any* fact against the People so as to abort the trial, whether that fact is an element under the statute of the offense or not; thus, if the defense argued that the offense must be proven to have been committed on a Tuesday and there was no such

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[28] *Korsen*, at 131.

[29] *Korsen*, at 137.

proof in the case, and the statute in fact contained no such element, if the trial judge concurred and aborted the trial, under petitioner's view double jeopardy would bar retrial. This converts the protection of the double jeopardy clause into a parlor trick. But *Martin Linen*'s analysis is *necessarily* tied to the elements of the offense, for an offense can only be "resolved" in any fashion with reference to its elements.[30] *Maker* and the Michigan Supreme Court here are correct.

Indeed, Respondent would urge that *Martin Linen* itself goes too far, and that to call a modern directed verdict an "acquittal" for jeopardy purposes is not compelled by either the text or history of the jeopardy clause. A judge granting a motion for directed verdict does not "resolve" an element (correctly or incorrectly), as the judge is not the factfinder, and is prohibited from weighing the evidence or assessing the credibility of witnesses, essential tasks of the resolution of the elements by the jury. The trial judge, rather, decides whether, as *a matter of law*, any rational factfinder *could* find guilt on an element or elements, taking the proofs in the light most favorable to the prosecution, and can most

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[30] When this court referred in *Martin Linen* to a "resolution, correct or not, of some or all of the factual elements of the offense charged" it was referring to an evidentiary resolution of the proofs on the element, even if mistaken, and even if a lack of proof was caused by an erroneous evidentiary ruling; it plainly was *not* referring to a legal determination as to *what* elements the statute demands be proven.

assuredly be mistaken (even under current law, a post-guilty verdict judgment notwithstanding the verdict, or judgment of acquittal, may be set aside and the jury verdict reinstated, as may a finding of insufficiency of the evidence by an appellate court). Justice would be served, and principles of jeopardy not offended, if erroneous directed verdicts of acquittal could be reviewed and set aside, and a full and fair opportunity to persuade the jury had in these circumstances.[31]

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[31] See *Kepner*, supra, and Westen and Drubel, "Toward A General Theory of Double Jeopardy," supra.

Relief

WHEREFORE, the People of the State of Michigan request that the petition for certiorari be denied.

Respectfully submitted,

KYM L. WORTHY
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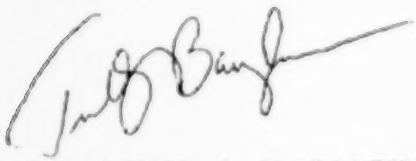

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REPLY BRIEF

RECORD
AND
BRIEFS

MAY 1 9 2012

No. 11-1327

In The

Supreme Court of the United States

LAMAR EVANS,

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition does not contest that there is a significant and longstanding split among the lower courts on the Double Jeopardy Clause issue this case presents. Nor does Respondent deny that Petitioner's case presents an excellent vehicle for this Court to decide that issue.

Respondent's argument on the merits demonstrates why certiorari should be granted. Respondent maintains that *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), and the courts that have followed *Maker* were correct to hold that the definition of "acquittal" found in *United States v. Martin Linen Supply Co.*, 430 U.S. 571 (1977), excludes a directed verdict granted because the prosecution failed to prove a fact not found among the elements of the charged offense. In making this argument, Respondent does not mention any of this Court's post-*Martin Linen* precedents, including *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); and *Smith v. Massachusetts*, 543 U.S. 462 (2005). All of these cases stand for the proposition that a trial judge's error in construing the elements of the charged offense "affects the accuracy of [an acquittal] but it does not alter its essential character." *Smalis*, 476 U.S. at 144 n. 7. Respondent's central claim, that a directed verdict based on the trial court's addition of an "extra" element to the charged offense is not an "acquittal," is impossible to reconcile with this Court's decisions in these cases because it is

a trivial matter to recast the trial courts' errors in such cases as adding extra elements. *See* Pet. for Cert. 11-13.

It strains logic to deny that Petitioner was "acquitted." At the close of the prosecution's case, he moved for an acquittal because the prosecution had failed to prove a particular fact that the commentary to the standard jury instruction called an "essential element" of the charged offense. *See* Pet. for Cert. 3 n. 1. The trial judge agreed and granted a directed verdict of acquittal, both orally and in writing. Under this Court's precedents, that decision was final for purposes of the Double Jeopardy Clause. But without this Court's intervention, lower courts, like Respondent, will continue to rely on *Maker* and its progeny to misread the *Martin Linen* definition of "acquittal" so as to permit retrials in cases such as Petitioner's.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 2012

PETITIONER'S BRIEF

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QUESTION PRESENTED

Does the Double Jeopardy Clause bar retrial after the trial judge erroneously holds a particular fact to be an element of the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that fact?

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OPINIONS AND ORDER BELOW

The March 26, 2012, opinion of the Michigan Supreme Court is published as *People v. Evans*, 810 N.W.2d 535 (Mich. 2012). App. 1.[1] The May 13, 2010, opinion of the Michigan Court of Appeals is published as *People v. Evans*, 794 N.W.2d 848 (Mich. Ct. App. 2010). App. 45. The February 23, 2009, Wayne County Circuit Court order granting Petitioner's motion for a directed verdict of acquittal is unpublished. App. 72.

JURISDICTION

The Michigan Supreme Court's judgment was issued on March 26, 2012. Petitioner filed a timely petition for a writ of certiorari on May 2, 2012, and this Court granted the petition on June 11, 2012.

Because the Michigan Supreme Court's decision would subject Petitioner to a second trial over his Double Jeopardy Clause objection, that decision is a final judgment subject to review under 28 U.S.C. § 1257. *See Smalis v. Pennsylvania*, 476 U.S. 140, 143 n. 4 (1986); *Abney v. United States*, 431 U.S. 651, 661-62 (1977).

[1] "App." refers to the appendix to the Petition for Writ of Certiorari. The Court granted a motion to dispense with the printing of a joint appendix.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. V (Double Jeopardy Clause):

. . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

STATEMENT

On September 22, 2008, two Detroit police officers observed a vacant house on fire and, a short time later, arrested Petitioner Lamar Evans nearby. App. 3. According to the officers, Mr. Evans was carrying a can of gasoline when they first spotted him, and he made an incriminating statement after he was detained. *Id.*

Petitioner was charged with "burning other real property" in violation of Mich. Comp. Laws § 750.73:

> Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years.

The referenced "next preceding section," Mich. Comp. Laws § 750.72, prohibits wilfully or maliciously burning "any dwelling house, either occupied or unoccupied, or the contents thereof," and provides a maximum sentence of 20 years imprisonment.

Petitioner's jury trial took place in the Wayne County Circuit Court in February 2009. At the close of the prosecution's case, Petitioner's counsel moved for a directed verdict of acquittal. App. 63-67. Counsel observed that the standard jury instruction for "burning other real property," Mich. Crim. Jury Inst. 2d 31.3, included an element that the burned building not be a dwelling house. App. 63, 65, 67. Counsel then pointed out that two witnesses had testified for the prosecution that the house was inhabited. App. 63-64. Therefore, counsel continued, the burned house was excluded from the definition of "other real property" because "the only evidence in this case is that this was an occupied dwelling, or that it was capable of being lived in." App. 65. The prosecutor responded that she did not believe the statute required the prosecution to prove that the burned property was not a dwelling. App. 68.

After hearing argument from both sides, the trial judge reviewed the standard jury instruction and commented that all of the listed elements appeared to be mandatory. App. 68. The judge next quoted from the official commentary to the instruction: "This offense is similar to the one described in CJI 2d § 31.2, except that an essential element is that the structure burned is *not* a dwelling house." App. 69 (quoting commentary to Mich. Crim. Jury Inst. 2d § 31.3; emphasis in original). The trial judge then observed that the statutory definition of the offense also specifically excluded the kind of property "specified in the next preceding section," i.e., dwelling houses. App. 70.

Having determined that the statute required proof that the burned property was not a dwelling house, the judge turned to the prosecution's evidence: "The testimony was this was a dwelling house, paid for for forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter." App. 71. Accordingly, the judge granted Petitioner's motion for a directed verdict of acquittal. *Id.* the judge confirmed her oral decision with a written order granting "the Motion for Directed Verdict of Acquittal." App. 72.

Respondent filed an appeal to the Michigan Court of Appeals. That court reversed the directed verdict and ordered a new trial. App. 45.

The appellate court first concluded that the trial judge erred in holding that the prosecution was required to prove that the building burned was not a dwelling house. App. 51-52 & n. 2.[2] The appellate court then rejected Petitioner's argument that the Double Jeopardy Clause barred a retrial. App. 53-62.

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[2] As the appellate court observed, the trial judge had apparently missed the "use note" accompanying the standard jury instruction directing that the fourth element should only be read to the jury when burning other real property is charged as a lesser included offense. App. 48 n. 1. The fourth element was removed from the standard jury instruction in September 2009, after Petitioner's trial. App. 52 n. 3. The commentary to the jury instruction on which the trial judge relied ("that an essential element [of burning other real property] is that the structure burned is *not* a dwelling house") was also removed at the same time.

Petitioner filed an application for leave to appeal to the Michigan Supreme Court in which he argued that the Double Jeopardy Clause barred a retrial. That court granted review and affirmed in a four-to-three decision. App. 1.

The Michigan Supreme Court majority held "that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." App. 2.

The majority found support for this holding from the definition of a directed verdict of acquittal set forth in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." App. 12. According to the majority, "the United States Supreme Court has not directly considered the related question at issue here regarding whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge." App. 13.

The majority acknowledged that this Court had held in *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); and *Smith v. Massachusetts*, 543 U.S. 462 (2005), that directed verdicts of acquittal were final for purposes of the Double Jeopardy Clause even though those

acquittals "were based on the prosecution's failure to prove something that the law did not actually require it to prove." App. 17 n. 39. But, according to the majority, all of those cases are distinguishable because "the trial courts in *Rumsey*, *Smalis*, and *Smith* resolved one of the factual elements of the crime charged, while the trial court in this case added an element and then found it unsupported by evidence in the record." *Id.*

The majority found support for this distinction in the Third Circuit's decision in *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985). According to the majority, *Maker* stands for the proposition that a retrial may be ordered if the trial judge granted a directed verdict of acquittal after erroneously adding an element to the offense (as opposed to erroneously construing an element of the offense). App. 25, n. 58; 29 n. 67.

Three justices dissented. Justice Cavanagh, joined by Justice Kelly, concluded that *Rumsey*, *Smalis*, and *Smith* foreclosed the argument that an acquittal may be reviewed if the judge erroneously required the prosecution to prove additional facts. App. 31-40. Justice Hathaway dissented separately to "disagree with the distinction that the majority draws between a trial court's erroneous ruling related to a required element of an offense and a trial court's erroneous ruling related to a mistakenly added element of an offense." App. 44.

SUMMARY OF ARGUMENT

The trial judge acquitted Petitioner when she granted a midtrial directed verdict after finding that the prosecution had failed to establish Petitioner's guilt on the charged offense. Therefore, the Double Jeopardy Clause barred both Respondent's appeal and the retrial that the Michigan Supreme Court has ordered.

This Court's precedents teach that it makes no difference to the analysis that it was the judge who ordered the acquittal, that it was Petitioner who moved for the acquittal, or that the acquittal was based on the judge's erroneous construction of the charged offense. For more than a century this Court has held, without exception, that a legal error leading to an acquittal has no effect on the decision's finality.

The Michigan Supreme Court recognized that this Court's cases establish that a directed verdict of acquittal is final even if it results from a trial judge's misconstruction of the charged offense so as to require the prosecution to prove more than the statute demands. The Michigan Supreme Court held, however, that a defendant is not truly "acquitted" if the judge's error effectively adds an element to the charged offense.

The Michigan Supreme Court's claimed distinction between a judge erroneously construing an element of the offense and a judge erroneously adding an element to the offense is based on a misreading of

the definition of "acquittal" found in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). *Martin Linen* explicitly recognized that a midtrial ruling that the prosecution has failed to prove its case is an acquittal even if it is incorrect. One year later, *United States v. Scott*, 437 U.S. 82 (1978), made it clear that *Martin Linen* drew a line between a ruling on a defendant's guilt or innocence and a ruling designed to serve another purpose. The trial judge's ruling in Petitioner's case was unquestionably about his innocence of the charged offense.

The "extra element" exception crafted by the Michigan Supreme Court is impossible to reconcile with this Court's post-*Martin Linen* cases holding that defendants were "acquitted" even when those acquittals resulted from trial judges' erroneous rulings requiring prosecutors to prove facts not found in the charged offenses. These cases demonstrate that the Michigan Supreme Court's attempt to distinguish between "extra element" cases and cases in which judges misconstrued the existing elements is arbitrary and illusory. Since any such case, including Petitioner's, can be characterized either way, the Double Jeopardy Clause bar on retrial cannot turn on such a meaningless distinction.

The "extra element" exception would lead to widespread prosecutorial appeals not only from directed verdicts but also from jury acquittals. Recognizing this exception, therefore, would seriously undermine the core protection against continuing expense and

anxiety the Double Jeopardy Clause affords to defendants who have been acquitted.

ARGUMENT

I. The Double Jeopardy Clause Precludes Retrial Following a Judgment of Acquittal Even If the Acquittal Was Based On a Legal Error As to the Elements of the Offense.

A. The Core Function of the Double Jeopardy Clause Is to Bar Further Trial Proceedings After a Finding, Correct or Not, That the Defendant Is Not Culpable.

As this Court explained in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that 'a verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" (quoting *Ball v. United States*, 163 U.S. 662, 671 (1896)) (brackets omitted). "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). "Thus, it is one of the elemental principles of our criminal law that the Government cannot

secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *Id.* at 188.

Therefore, once an acquittal has been rendered, "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). An acquitted defendant cannot be retried for the same offense, *see, e.g.*, *Ball*, *supra*, nor can he be subjected to a continuation of the same trial on that offense, *Smalis*, 476 U.S. at 146; *see also Smith v. Massachusetts*, 543 U.S. 462 (holding midtrial directed verdict of acquittal on one count precluded judge from reinstating that count later in same trial).

The Clause bars not only further trial proceedings following an acquittal but also any appeal that could result in such proceedings: "When a successful postacquittal appeal by the prosecution would lead to proceedings that would violate the Double Jeopardy Clause, the appeal itself has no proper purpose." *Smalis*, 476 U.S. at 145.[3]

A directed verdict of acquittal rendered by a judge during a trial is fully equivalent to a jury acquittal for

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[3] The one exception to the rule against further proceedings following an acquittal is that the prosecution may appeal from a post-trial judgment of acquittal entered after a guilty verdict because a successful appeal would simply reinstate the guilty verdict without further trial proceedings going to guilt or innocence. *See United States v. Wilson*, 420 U.S. 332, 352-53 (1975).

double jeopardy purposes. As this Court put it in *Smith*, "we have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." 543 U.S. at 467 (citations omitted).

The absolute bar against further proceedings following an acquittal only applies if, of course, the defendant has actually been acquitted. In *Martin Linen* and *United States v. Scott*, 437 U.S. 82 (1978), this Court established a bright line between acquittals and other judicial decisions terminating a criminal proceeding.

In *Martin Linen*, this Court defined a judicial acquittal as "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. *Scott*, decided one year after *Martin Linen*, made plain the difference between an acquittal and other midtrial rulings terminating a prosecution that do not raise the Double Jeopardy Clause bar. In *Scott*, the Court held that the Government could appeal from a midtrial ruling granting a defendant's motion to dismiss the charges because of preindictment delay:

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him *on a basis unrelated to factual guilt or innocence of the offense with which he is accused*, suffers

> no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.

Scott, 437 U.S. at 98-99 (emphasis added).

As *Scott* explained the holding in *Martin Linen*, "Where the court, before the jury returned a verdict, enters a judgment of acquittal . . . , appeal will be barred only when 'it is plain that the [trial court] . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.'" *Scott*, 437 U.S. at 97 (quoting *Martin Linen*, 430 U.S. at 572). *Scott* continued:

> Such a factual finding *does* 'necessarily establish the criminal defendant's lack of culpability' under the existing law; the fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles,' affects the accuracy of that determination, but it does not alter its essential character. By contrast, the dismissal of an indictment for preindictment delay represents a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation.

Scott, 437 U.S. at 98 (quoting *id.* at 106 (Brennan, J., dissenting); footnote omitted; emphasis in original).

Throughout *Scott*, the Court repeatedly explained that the distinguishing feature of a ruling that is not an "acquittal" within the meaning of *Martin Linen* is

that it is *unrelated to the defendant's guilt or innocence*. *See id.* at 98 n. 11 ("a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word"); *id.* at 99 ("respondent . . . persuad[ed] the trial court to dismiss [the indictment] on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted"); *id.* at 100 (the Double Jeopardy Clause bar does not apply when defendant "obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence."); *id.* at 101 ("We now conclude that where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the government from his successful effort to do so is not barred").

Martin Linen and *Scott* thus drew a clear distinction between: (1) a trial court ruling, whatever its label, correct or not, finding that the prosecution had failed to prove the defendant's guilt; and (2) a trial court ruling terminating the proceedings for reasons "unrelated to factual guilt or innocence." *Scott*, 437 U.S. at 98. The former is an acquittal subject to the Double Jeopardy Clause bar on further proceedings, while the latter is not.

Scott stressed that this Double Jeopardy Clause line is bright: "In other circumstances, this Court has had no difficulty distinguishing between those rulings

which relate to 'the ultimate question of guilt or innocence' and those which serve other purposes." 437 U.S. at 98 n. 11 (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)). Indeed, lower courts since *Martin Linen* and *Scott* generally have had no difficulty identifying the line. *See, e.g., United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 225 (4th Cir. 1988) (permitting prosecutorial appeal of dismissal of allegedly duplicitous count because "the district court disposed of count II on a basis unrelated to the factual guilt or innocence of the defendants"), cert. denied, 490 U.S. 1035 (1989); *Wilkett v. United States*, 655 F.2d 1007, 1012 (10th Cir. 1981) (permitting retrial following dismissal for improper venue because "the workings of the jeopardy doctrine revolve around guilt or innocence").

The trial judge's ruling in Petitioner's case was manifestly on the "guilt or innocence" side of the line drawn in *Scott* and *Martin Linen*. In response to Petitioner's motion for a directed verdict of acquittal, the judge examined the statute, the standard jury instruction, and the commentary to that instruction, which stated at the time of Petitioner's trial that "an essential element is that the structure burned is *not* a dwelling house." App. 69 (quoting former commentary to Mich. Crim. Jury Inst. 2d § 31.3; emphasis in original). The judge then reviewed the prosecution's evidence: "The testimony was this was a dwelling house, paid for for forty-some-odd thousand dollars. That the folks had moved some stuff into it, even though it doesn't matter." App. 71. The judge

accordingly granted the motion to acquit and issued a written order confirming the grant. App. 71, 72.

As in *Martin Linen*, "it is plain that the [trial court] . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S. at 572. Unlike *Scott*, it is equally plain that this ruling was not "unrelated to guilt or innocence." On the contrary, the ruling, correct or not, was entirely about Petitioner's innocence of the charged offense.

Finally, it makes no difference for Double Jeopardy Clause purposes that the trial judge's decision in this case turned out to be based on a legal error as to the elements of the offense. This Court has long held that an acquittal by judge or jury cannot be appealed even if the proceedings leading to the acquittal, or the acquittal itself, are infected with legal error. More than a century ago, this Court held in *Ball*, *supra*, that the Double Jeopardy Clause prohibited the prosecution from retrying a defendant who had been acquitted by a jury after a trial under a fatally defective indictment, so long as the court that tried the case had jurisdiction to hear it. 163 U.S. at 669-70. In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court relied on *Ball* to hold that the Double Jeopardy Clause precluded a retrial after the district judge had granted a midtrial directed verdict of acquittal due to prosecutorial misconduct and the lack of credibility of the prosecution's witnesses. The Court stressed that the trial had "terminated with the entry of a final judgment of acquittal as to each petitioner[,]" even

though "[t]he Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation." *Id.* at 143.

Since *Martin Linen* and *Scott*, this Court has repeatedly reaffirmed that the Double Jeopardy Clause precludes an appeal from a trial judge's decision to grant an acquittal no matter how legally erroneous a reviewing court might find that decision to be. In *Sanabria v. United States*, 437 U.S. 54 (1978), the district judge had erroneously excluded certain evidence, and that error that led directly to his decision to grant a midtrial directed verdict on a particular count of an indictment, but the Court held that the "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id.* at 68-69. The Court summarized its holding:

> The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge. As *Fong Foo v. United States* makes clear, the Double Jeopardy Clause absolutely bars a second trial in such circumstances.

Id. at 78.

In *Arizona v. Rumsey*, 467 U.S. 203 (1984), the Court again held that the Double Jeopardy Clause barred review of a legally erroneous acquittal. During the penalty phase of a capital trial, the judge "acquitted" Rumsey of the death penalty after concluding, erroneously, that Arizona's "pecuniary value" aggravating circumstance applied only to contract

killings. *Id.* at 206. In holding that the Double Jeopardy Clause precluded a retrial of the penalty phase, the Court observed:

> In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination, but it does not alter its essential character." Thus, *the Court's cases hold that an acquittal on the merits bars retrial even if based on legal error.*

Id. at 21[illegible] (emphasis added; quoting *Scott*, 437 U.S. at 98; internal quotation marks and citation omitted).

Two years later in *Smalis*, *supra*, the Court once again rejected a prosecution argument that a trial judge's grant of acquittal is reviewable if legally erroneous. The trial judge in *Smalis* granted the defendants' motion for a demurrer at the close of the prosecution's case because the evidence was insufficient to establish guilt. 476 U.S. at 141-42. This Court held that this decision was an acquittal for Double Jeopardy Clause purposes and therefore was not subject to review. *Id.* at 144. The Court further observed that "The status of the trial court's judgment as an acquittal is not affected by the Commonwealth's

allegation that the court erred in deciding what degree of recklessness was required to be shown under Pennsylvania's definition of third-degree murder." *Id.* at 144 n. 7 (internal quotation marks, citation, and brackets omitted).

Most recently in *Smith*, this Court reaffirmed yet again that the Double Jeopardy Clause does not contain an exception allowing prosecutorial appeals and retrials when trial courts have committed legal errors in acquitting defendants. The trial judge in *Smith* granted a directed verdict on a firearms possession count at the close of the prosecution's case on the ground that the victim's testimony describing the gun as a .32 or .38 caliber pistol was insufficient to establish that the gun barrel was less than 16 inches long. 543 U.S. at 465. After Smith presented his case on the remaining counts, the prosecutor moved to reinstate the firearms count, claiming that he had found precedent holding that witness testimony as to the type of gun was sufficient to establish the barrel length. *Id.*

In holding that the Double Jeopardy Clause barred the judge from reinstating the firearms count later in the same trial, the Court explicitly acknowledged the prosecution's argument that the judge's initial ruling "was wrong because the Commonwealth's evidence was, as a matter of law, sufficient[.]" *Id.* at 473. But, the Court continued, "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a

preverdict acquittal that is patently wrong in law." *Id.* (citing *Smalis*, *Sanabria*, *Martin Linen*, and *Fong Foo*, *supra*).

From this unbroken line of precedent, it follows immediately that the Double Jeopardy Clause should have barred Respondent's appeal from the trial judge's decision to acquit him on February 23, 2009. After hearing argument from the parties at the close of the prosecution's case, the trial judge made a final and formal decision, both orally and in writing, finding that the prosecution had failed to prove Petitioner's guilt. App. 63-72. This Court's precedent makes it unmistakably clear that it does not matter for Double Jeopardy Clause purposes that it was the judge, not the jury, that found the prosecution's evidence insufficient, nor does it matter that the judge's decision was based on legal error. Petitioner was acquitted, and his jeopardy should have terminated on that day.[4]

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[4] Respondent claims that the acquittal should be reviewable because Petitioner was able to persuade the judge to grant it. *See* Respondent's Brief Opp. Cert. 3 (arguing Double Jeopardy Clause inapplicable because Petitioner was able to "*avoid* a jury resolution of the case by having the trial judge take it away from the jury.") (emphasis in original). This Court squarely rejected the exact same argument in *Sanabria*. After observing that most acquittals stem from defense motions, the Court concluded: "To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests and would vitiate one of the fundamental rights established by the Fifth Amendment." 437 U.S. at 77-78 (citations omitted).

B. The Michigan Supreme Court's Attempt to Carve Out an "Extra Element" Exception to the Definition of "Acquittal" Is Unfaithful to This Court's Precedent and Unworkable in Application, and Such an Exception Would Result in Frequent and Unpredictable Appeals of Both Directed Verdicts and Jury Acquittals.

Despite the precedent discussed above, the Michigan Supreme Court held that Petitioner was not "acquitted" within the meaning of the Double Jeopardy Clause because the trial court committed a legal error by finding that the prosecution had failed to introduce sufficient evidence on an element not actually found in the offense with which Petitioner was charged. To reach this conclusion, the Michigan Supreme Court parsed the definition of a judicial "acquittal" found in *Martin Linen*: "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. Because that definition turns on "the factual elements of the offense charged," the Michigan Supreme Court reasoned that a trial judge's ruling that the prosecution has failed to prove its case is not actually an "acquittal" if it is based on the prosecution's failure to prove an *extra* element. App. 2, 17, 26-27.[5]

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[5] The Michigan Supreme Court found support for this "extra element" exception in *United States v. Maker*, 751 F.2d 614, 624

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The Michigan Supreme Court acknowledged that this Court had repeatedly held that an acquittal is final for Double Jeopardy Clause purposes even if based on "erroneous interpretations of governing legal principles." App. 27 n. 64 (quoting *Scott*, 437 U.S. at 98). However, the Michigan Supreme Court concluded that there is a constitutionally significant distinction between a directed verdict based on a misconstruction of an element of the governing law and a directed verdict based on the addition of an element to the governing law. App. 27-28 n. 64.

That conclusion was error. First, the Michigan Supreme Court's decision turns on an unsustainable reading of the distinction drawn in *Martin Linen* and *Scott* between acquittals and other types of rulings in a defendant's favor. Second, the "extra element" exception the Michigan Supreme Court adopted is arbitrary and unworkable in practice and is impossible to reconcile with this Court's post-*Martin Linen* cases barring review after trial courts granted acquittals based on erroneous constructions of the charged offenses. Finally, the Michigan Supreme Court's holding would frustrate the core purpose of the Double Jeopardy Clause by encouraging prosecutorial appeals after many, if not most, midtrial directed verdict grants and after even some jury acquittals.

(3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985). App. 25, n. 58; 29, n. 67 (citing *Maker*).

The Michigan Supreme Court effectively rewrote the *Martin Linen* definition of a judicial acquittal to be "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *correct* factual elements of the offense charged." The second "correct" is not found in the actual definition, and this Court's cases make clear that it does not belong there.

As discussed above, the Double Jeopardy Clause line that this Court has actually drawn is between a ruling in which the trial court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction," *Martin Linen*, 430 U.S. at 572, and a ruling "on a basis which did not depend on guilt or innocence." *Scott*, 437 U.S. at 99. The Michigan Supreme Court's holding that Petitioner was not acquitted is thus based on a myopic reading of the *Martin Linen* definition of "acquittal" and it ignores the distinction established in *Scott*. Under any fair reading of *Martin Linen* and *Scott*, Petitioner was acquitted on February 23, 2009.

The Michigan Supreme Court acknowledged that no precedent of this Court actually supported the "extra element" exception it engrafted onto *Martin Linen*. Instead, the Michigan Supreme Court maintained that the existence of such an exception was an open question because this Court "has not directly considered" it. App. 13.

Having concluded the question is open, the Michigan Supreme Court attempted to create a

constitutional distinction between two scenarios, both of which feature a trial judge granting a directed verdict "based on the prosecution's failure to prove something that the law did not actually require it to prove." App. 17 n. 39. In the first scenario, the trial judge granted a directed verdict after he erroneously "resolved one of the factual elements charged;" in the second scenario, he granted a directed verdict after he erroneously "added an element and then found it unsupported by the evidence in the record." *Id.* According to the Michigan Supreme Court, the judge in the first scenario has acquitted the defendant, but the judge in the second scenario has not. *Id.*

The Michigan Supreme Court expressly drew this line in an effort to distinguish *Rumsey*, *Smalis*, and *Smith*. *Id.* But these three cases, and Petitioner's case, demonstrate that the claimed distinction is illusory and arbitrary.

In *Rumsey*, the trial judge acquitted the defendant of the death penalty after holding erroneously that a pecuniary value aggravating circumstance applied only to "a contract-type killing situation and not to a robbery, burglary, etc." 467 U.S. at 206. This Court concluded that the Double Jeopardy Clause precluded retrial of the penalty phase despite the trial court's erroneous construction of the statute. *Id.* at 211.

According to the Michigan Supreme Court, there was an "acquittal" in *Rumsey* because the trial court's error was to misconstrue the pecuniary value

aggravating circumstance so as to require a contract killing. But the error in *Rumsey* can just as easily be regarded as adding an extra element – that the defendant committed the killing pursuant to a contract.

There is absolutely no substantive difference between the two characterizations of the trial court's error in *Rumsey*. But, according to the Michigan Supreme Court, the first characterization means that the Double Jeopardy Clause bars an appeal of the judge's ruling while the second characterization permits an appeal and a retrial.

In *Smalis*, the trial court granted a demurrer at the close of the prosecution's case, concluding that the prosecution failed to prove several of the charged offenses, including third-degree murder. 476 U.S. at 141-42. The prosecution argued that the judge had mistakenly increased the case the prosecution was required to prove when it "erred in deciding what degree of recklessness was . . . required to be shown under Pennsylvania's definition of [third-degree] murder." *Id.* at 144 n. 7. This Court rejected the contention that the error mattered: "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination but it does not alter its essential character." *Id.* (quoting *Scott*, 437 U.S. at 98) (internal quotation marks and citation omitted).

According to the Michigan Supreme Court, retrial was barred in *Smalis* because the trial court erroneously construed an actual element of the offense. But just as in *Rumsey*, it is equally plausible to characterize the claimed error in *Smalis* as the erroneous addition of an element, in this case one requiring a heightened degree of recklessness. Once again, the choice of characterization is arbitrary.

In *Smith*, the trial judge granted a midtrial directed verdict because she concluded, apparently contrary to binding precedent, that witness testimony describing the kind of gun defendant used was legally insufficient to prove that the barrel length was less than 16 inches. 543 U.S. at 465. This Court held that this ruling acquitted Smith of the firearms count even if it was legally erroneous. *Id.* at 473.

As with *Rumsey* and *Smalis*, this conclusion is difficult, if not impossible, to defend if the Michigan Supreme Court's view is correct. The trial court's ruling in *Smith* can easily be recast as requiring the prosecution to prove an "extra element," that is, not only must the barrel length by less than 16 inches but there must also be direct evidence supporting that conclusion. If the Michigan Supreme Court is correct, *Smith* should come out the other way so long as a reviewing court is able to characterize the trial judge's error as effectively adding an element.

Because the "extra element" exception applied below finds no support in this Court's precedents and is unworkable in application, there are only a very

few lower court decisions that have even attempted to apply it. *See United States v. Maker*, 751 F.2d 614, 623-24 (3d Cir. 1984) (ordering retrial after district judge acquitted defendant of mail fraud based on erroneous holding that government must prove entire scheme was planned beforehand), cert. denied, 472 U.S. 1017 (1985); *State v. Korsen*, 69 P.3d 126, 136-37 (Idaho 2003) (relying on *Maker* and ordering retrial after trial judge acquitted defendant of trespass based on erroneous holding that official must have adequate reason to order defendant to leave); *see also United States v. Lynch*, 162 F.3d 732, 735 (2d Cir. 1998) (rejecting argument that trial judge who acquitted abortion protestors of criminal contempt because they acted pursuant to genuine religious beliefs thereby added extra element); *id.* at 745-46 (Feinberg, J., dissenting) (arguing acquittal should be reversed and conviction entered because judge added "extra factor" to prosecution's burden).[6]

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[6] Other courts have explicitly rejected the argument that a defendant may be retried if the trial court granted a directed verdict after erroneously requiring the prosecution to prove additional facts not found in the charged offense. *See, e.g., Carter v. State*, 227 S.W.3d 895, 898 (Ark.) (holding retrial of aggravated robbery barred even though trial judge erroneously required prosecution to prove defendant used gun as firearm and not as club), cert. denied, 549 U.S. 943 (2006); *State v. Large*, 607 N.W.2d 774, 780 (Minn. 2000) (holding retrial barred after acquittal even if trial judge erred in requiring prosecution to prove multiple sexual acts); *State v. Lynch*, 399 A.2d 629, 634-37 (N.J. 1979) (holding retrial of accessory after the fact charge barred

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Petitioner's case itself illustrates the arbitrary nature of the distinction drawn by the Michigan Supreme Court. The trial judge granted the acquittal after requiring the prosecution to prove that the property burned was not a dwelling house. But that error can equally plausibly be viewed as either: (1) the misconstruction of the second element of the charged offense, which requires proof that "the property that was burned was a building or any of its contents," Mich. Crim. Jury Inst. 2d 31.3(3); or (2) the addition of an "extra element" requiring proof that the property is not a dwelling house. The Michigan Supreme Court never explained why the trial judge's mistake could only be viewed as the latter type of error and not the former, just as it never explained why the trial judges' mistakes in *Rumsey*, *Smalis*, and *Smith* could only be viewed as the former and not the latter.

As all of these cases demonstrate, there is no substantive distinction between a judge requiring the prosecution to prove additional facts by misconstruing the elements of an offense and a judge requiring the prosecution to prove additional facts by adding an element to that offense. Any case in which the judge increases the prosecution's burden can equally plausibly be characterized either way. Since the "difference" is purely a matter of semantics, the application

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even though trial judge erred by requiring prosecution to prove defendant had personal knowledge of principal's crime).

of the fundamental Double Jeopardy Clause bar on further proceedings cannot turn on such a distinction.

This Court emphasized in *Scott* that there was "no difficulty distinguishing between those rulings which relate to the ultimate question of guilt or innocence and those which serve other purposes." 437 U.S. at 98 n. 11 (internal quotation and citation omitted). The Michigan Supreme Court's new exception to the line between acquittals and other rulings not only produces difficulty in distinguishing between rulings, it is simply impossible to apply meaningfully.

Finally, it is indisputable that the "extra element" exception would seriously undermine the core Double Jeopardy Clause protection against post-acquittal proceedings. If this Court adopts the exception, every time a trial judge grants a midtrial directed verdict of acquittal after interpreting the offense in a way with which the prosecution disagrees, the prosecution would be entitled to appeal in order to argue that the judge's interpretation effectively added an extra element. Presumably, most of those appeals would be unsuccessful because appellate courts would conclude that the judge really did acquit the defendant, in which case "the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him." *Smalis*, 476 U.S. at 145; *see also Green*, 355 U.S. at 187-88 (recognizing Clause intended to prevent State from subjecting once-tried defendant "to embarrassment, expense and ordeal and compelling

him to live in a continuing state of anxiety and insecurity").

Indeed, the Michigan Supreme Court's "extra element" exception would permit an appeal even from a *jury* acquittal in any case in which the prosecution claims that the judge erroneously instructed the jury so as to add an element to the charged offense and that the error caused the jury to acquit. *Compare Ashe v. Swenson*, 397 U.S. 436, 445 (1970) (examining trial record to determine reason for jury's acquittal).

Petitioner's case illustrates that point. If the judge had not granted a directed verdict and had instead instructed the jury that the prosecution must prove that the property burned was not a dwelling house, the jury presumably would have found Petitioner not guilty. Under the Michigan Supreme Court's reasoning, the prosecution would have been entitled to appeal that jury verdict and subject Petitioner to a retrial so long as it could convince an appellate court both that the instructions added an element to the offense and that the error caused the jury to acquit.

In short, the "extra element" exception is unworkable and arbitrary, and it is inconsistent with the line this Court drew in *Martin Linen* and *Scott* and with the cases this Court has decided since *Martin Linen*. It would create an enormous hole in the absolute bar against further proceedings following acquittals.

Contrary to the conclusion of the Michigan Supreme Court, Petitioner was acquitted on February 23, 2009, when the trial judge examined the governing

statute and the prosecution's evidence and issued a final decision concluding that Petitioner was not guilty of the charged offense. His jeopardy terminated that day because that decision, correct or not, was unquestionably a ruling "which relate[s] to the ultimate question of guilt or innocence" and was not a ruling intended to "serve other purposes." *Scott*, 437 U.S. at 98 n. 11.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 11-1327

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In The

Supreme Court of the United States

LAMAR EVANS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Does the Double Jeopardy Clause bar retrial after the trial judge erroneously adds a factual element to the offense and then grants a midtrial directed verdict of acquittal because the prosecution failed to prove that element?

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STATEMENT OF THE CASE

At trial, defense counsel argued that the wrong charge had been brought, and so a directed verdict of acquittal should be granted. He argued that "the burning of real property means to the exclusion of burning an occupied or unoccupied dwelling." App. 63. Because, he argued, there was some evidence that someone was living in the house, there was insufficient proof of burning real property. An element, counsel urged on the court, of burning real property "is that the building was not a dwelling house. . . . the only evidence in this case is that this was an occupied dwelling, or that it was capable of being lived in." App. 65. The trial court noted that the witness had said they were "in the process" of moving in, with small appliances, and that there was no water, gas, or electricity. App. 66. Counsel asked for a directed verdict because "the fourth element is that the building was not a dwelling house. . . . the People have to prove that it was not a building house. It was not a house." App. 67. The prosecution argued that the statute (MCL § 750.73) does not require proof of the negative of the element that makes the offense the greater offense – that is, that the building is *not* a dwelling. App. 68. "The charge is arson of real property. Whether it's a dwelling, whether it's occupied, whether it's lived in doesn't matter for the purposes of the statute; only that a structure or building is burned." App. 69.

The trial judge, reading from the commentary to the jury instruction, noted that for this offense the

"legislature simply eliminated the element of habitation" (making it a less serious offense than arson of a dwelling). App. 69. The trial judge stated that the statute "Specifically says it cannot be a dwelling." App. 69. The trial judge then granted a "directed verdict" as a "matter of law." App. 70-71.

Respondent appealed. The Michigan Court of Appeals said that it was "undisputed that the trial court misperceived the elements of the offense with which defendant was charged and erred by directing a verdict," observing that "Even defendant admitted in his brief on appeal that the trial court's directed verdict of acquittal was 'technically incorrect.'"[1] App. 52. That court reversed and remanded for a new trial, concluding that the "trial court's order granting a directed verdict in favor of defendant does not constitute an acquittal for double jeopardy purposes, because the trial court failed to resolve any of the elements that actually must be satisfied to establish the offense of burning other real property."[2] The Michigan Supreme Court granted petitioner's application for leave to appeal, and affirmed the Court of Appeals. The court held that the directed verdict, despite its label, was not an acquittal for jeopardy purposes, as it resolved no actual factual element of

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[1] *People v. Evans*, 288 Mich. App. 410, 416, 794 N.W.2d 848, 852-853 (2010).

[2] 288 Mich. App. at 422, 794 N.W.2d at 856.

the offense charged.[3] App. 30. This Court then granted Petitioner's petition for certiorari.

SUMMARY OF ARGUMENT

Petitioner's trial was not ended before verdict without his consent; rather, he sought termination of his trial before verdict of the jury by requesting a directed verdict of acquittal. His counsel argued that the offense charged, arson of real property, contained a "fourth element"; namely, that the prosecution was required to prove the *absence* of the element that distinguished the charged offense from the greater offense of arson of a dwelling. The trial judge agreed that the offense charged contained that element, found a lack of sufficient proof regarding it, and entered a judgment of acquittal "as a matter of law." Both the Michigan Court of Appeals and the Michigan Supreme Court found that no acquittal had occurred, as the trial judge had not "actually" resolved, despite the label of her ruling, any of the "factual elements of the offense charged." Petitioner's appellate counsel conceded throughout the appellate

[3] "We hold that when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." *People v. Evans*, 491 Mich. 1, 25, 810 N.W.2d 535, 548-549 (2012).

process that the trial judge had erred in identifying the elements of the charged offense.

The Michigan Supreme Court correctly resolved the double jeopardy issue. The label of the trial court's action is not controlling, and a judicial acquittal in a jury trial occurs only when the trial court "actually" resolves, whether correctly or incorrectly, one or more of the "factual elements of the charged offense." This is not a case where the trial judge wrongly excluded evidence, leading to a lack of sufficient proof on an element of the offense, or where the trial judge misperceived that evidence required to prove one of the factual elements of the offense. Rather, the trial judge "resolved" a fact that was not one of the constituent parts of the crime charged – one of those facts legally essential for punishment to be inflicted – which had to be proved to sustain a conviction. No acquittal of any sort occurred, and retrial is thus permissible.

Further, Respondent submits that a "verdictless" judgment of acquittal should not bar retrial under the Jeopardy Clause. An acquittal is a verdict by the factfinder, after weighing evidence and assessing credibility of witnesses, while a judgment of acquittal, which does not weigh evidence or assess the credibility of witnesses, is a ruling of law that the evidence is not sufficient to support a conviction. This ruling of law may be wrong. Jeopardy should be viewed as

continuing if that ruling of law is shown wrong, and a second trial thus allowed.

ARGUMENT

I.

A judicial acquittal in a jury trial is a resolution by the trial judge, correct or not, of one or more of the factual elements of the offense charged; that is, a resolution of one or more of the constituent parts of the crime charged – one or more of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction.

A. Introduction

Several things are indisputable in this case.

- No wish of the Petitioner to have this case determined by the jury was thwarted by the prosecution or the court, the Petitioner seeking – successfully – to *avoid* a jury resolution of the case by having the trial judge take it from the jury.[4] The

[4] Petitioner misapprehends Respondent's point. Petitioner asserts at fn. 4 that Respondent is here arguing that Petitioner *waived* his jeopardy claim by moving for a directed verdict. But Respondent's point is that this is not a case involving a loss by a criminal defendant of his "valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949), given the motion, and that further, if, whatever its label, the termination of the trial

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case involves no attempt to harass the defendant through repeated prosecutions, as all the State seeks is one full and fair opportunity to have the case decided by a jury.

- The trial court "wrongly added an extraneous element to the statute under which"[5] the Petitioner was charged, and terminated the trial, at Petitioner's urging, by finding an absence of proof on this "extraneous" or "faux" element; namely, that the element distinguishing an uncharged greater arson offense from

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was *not* an acquittal – because not a resolution, correct or not, of any actual element of the offense charged – then Petitioner's consent by moving for the termination of the trial is outcome-determinative of the jeopardy claim.

[5] *People v. Evans*, 491 Mich. 1, 3, 810 N.W.2d 535, 536 (2012). Though Petitioner's counsel argued at trial that the negative of the element distinguishing the greater offense from the charged offense – that the structure burned be a dwelling – is an element of the charged offense, that it is not an element has been conceded throughout the appellate proceedings by Petitioner's various counsel. As Petitioner's counsel put it in the Michigan Supreme Court, "The trial judge . . . determined that *Antonelli* [*People v. Antonelli (On Rehearing)*, 66 Mich. App. 138, 238 N.W.2d 551 (1975)] requires proof that the structure is not a dwelling house, and granted a directed verdict of acquittal after finding that the prosecution failed to present sufficient evidence as to this 'element'. . . . The *Antonelli* case itself holds otherwise. . . ." (Defendant's Brief, p. 10). And Petitioner in this Court recognizes the error of the trial judge, referring in his statement of the question to the trial judge "erroneously hold[ing] a particular fact to be an element of the offense. . . ." Petitioner's Brief, page i.

> the charged offense – that the structure burned be a dwelling – had not been proven to be *absent* from the charged offense.

In this case, the trial court erred by holding, on Petitioner's motion and consistent with his argument, that the prosecution was required to prove the absence of the element that distinguished the uncharged greater arson offense from the charged offense. "Greater" offenses are characterized by having an additional factual element or elements than their included offenses, which, where the greater offense is charged, are subsets of the factual elements of the greater offense.[6] If the jury is not convinced beyond a reasonable doubt of the *presence* of the additional element, but convinced beyond a reasonable doubt of the remaining elements, the proper verdict is one of guilt on the lesser offense. But it is *not* the case – indeed, it would be absurd beyond belief – that the jury, to convict of the included or lesser offense, must be persuaded beyond a reasonable doubt of the *absence* of the element that distinguishes the greater offense, whether instructed on that lesser offense as an included offense of a greater offense, or whether that lesser offense is charged, as here, alone.[7] That

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[6] *Schmuck v. United States*, 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989); *People v. Cornell*, 466 Mich. 335, 646 N.W.2d 127 (2002).

[7] As the Michigan Supreme Court has cogently put the matter, " 'Elements are, by definition, positive. A negative element of a crime is a contradiction in terms.' In the instant case, 'without

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there is no such requirement with regard to the specific statute at issue here was determined in Michigan 34 years before the trial judge here held to the contrary.[8] And so, for second-degree murder, for example, the absence of premeditation need not be shown; for manslaughter, the lack of malice need not be shown; for unarmed robbery, the absence of a weapon need not be shown; and here, for arson of real property, the prosecution was not required to prove that the property was *not* a dwelling.

But Petitioner insists that the termination of the trial here on his motion and over the objection of the prosecution, by a finding of a lack of proof regarding a "fact" that is concededly *not* a "factual element of the charged offense," constitutes an acquittal.[9] Respondent will argue first that the

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malice' is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt. Malice or "malice aforethought" is that quality which distinguishes murder from manslaughter. . . ." *People v. Doss*, 406 Mich. 90, 99, 276 N.W.2d 9, 12 (1979).

[8] *People v. Antonelli (On Rehearing)*, 66 Mich. App. 138, 140-141, 238 N.W.2d 551, 552-553 (1975): "Our previous opinion in this case has been correctly characterized as 'reverse reasoning'. . . . the offense of burning a building not a dwelling would be a lesser included offense of the crime of burning a building which is a dwelling."

And see *Evans*, 491 Mich. at 20, 810 N.W.2d at 546: "The elements of burning of other real property . . . are '(1) the burning of any building or other real property, or the contents thereof, and (2) that the fire was willfully or maliciously set.'"

[9] One is reminded of the apt response of Inigo Montoya to Vizzini in *The Princess Bride*. After Vizzini tries to kill Dread

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termination of a trial with the consent of a criminal defendant, based on a finding of a lack of proof of an "extraneous" or "faux" "factual element," is not, under this Court's precedents, an "acquittal," that question requiring a determination of "whether the ruling of the judge, whatever its label, *actually represents* a resolution, correct or not, of some or all of the factual elements of the offense charged."[10] Rather, it is a termination of the trial – again, with the Petitioner's approval – "before verdict on grounds unrelated to factual guilt or innocence,"[11] so that retrial is permitted under the Jeopardy Clause. Respondent will then argue that the Court should consider a refinement or alteration of its current doctrine concerning "judicial acquittals" in jury trials.

Pirate Roberts (who is actually Westley) by cutting his rope, but Westley, rather than falling, clings to a rock, Vizzini exclaims "He didn't fall?! Inconceivable!" to which Inigo responds "You keep using that word. I do not think it means what you think it means."

[10] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977) (emphasis supplied).

[11] *United States v. Scott*, 437 U.S. 82, 87, 98 S.Ct. 2187, 2191-2192, 57 L.Ed.2d 65 (1978).

B. Judicial Acquittals In Jury Trials and the Protection Against Double Jeopardy: "We must Determine Whether the Ruling of the Judge, Whatever its Label, Actually Represents a Resolution, Correct or Not, of Some or All of the Factual Elements of the Offense Charged"

(1) The *Martin Linen* test requires reference to the actual "factual elements of the offense charged"

The lead case is *United States v. Martin Linen Supply.*[12] A judgment of acquittal was requested by the defense and granted by the trial court after a mistrial had been declared because the jury was "hopelessly deadlocked," and thus unable to reach a verdict. The appeal by the United States was disallowed by the circuit court in reliance on *United States v. Jenkins,*[13] the circuit court observing that "*Jenkins* stated the general rule for appealability as follows: 'But it is enough for purposes of the Double Jeopardy Clause, . . . that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. . . .'" The circuit court concluded that

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[12] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

[13] *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), overruled by, *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

> In the case of a mistrial followed by a timely motion for acquittal under Rule 29(c), F.R.Crim.P., which motion is granted, further proceedings devoted to the resolution of factual issues would necessarily follow a successful appeal by the Government. . . . The *Jenkins* standard thus leads inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below.[14]

This Court then took up the case; focusing on the jeopardy interest against the prevention of multiple trials, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result in "another trial."[15] Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then defined as "a ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged"[16] (in the context of what might be called a "judicial acquittal" in a jury trial, by the entry of a judgment of acquittal).

What, then, does "a ruling of the judge, whatever its label, [that] actually represents a resolution,

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[14] *United States v. Martin Linen Supply Co.*, 534 F.2d 585, 588-589 (CA 5, 1976). The *Jenkins* standard relied on by the circuit court no longer governs, that case being overruled later, after the decision by this Court in *Martin Linen*.

[15] 97 S.Ct. at 1354.

[16] 97 S.Ct. at 1355.

correct or not, of some or all of the factual elements of the offense charged" mean? What reading will the language bear? Just as constitutional provisions themselves are to be given their ordinary meaning,[17] in construing these provisions this Court should also be taken to have "employed words in their most natural sense" and to "have intended what it said." Parsing the language, then, first, it matters not what label is placed on the ruling, or what form that action took.[18] Though called a "dismissal" the termination of a trial may constitute an acquittal; similarly, though labeled an acquittal a termination of a trial may constitute a dismissal. Rather than the form or label controlling, the action of the trial judge must "*actually*" resolve something – and what must it resolve? – one or more of the *factual elements* of the *offense charged*. And what are the factual elements of a crime? It has been said that at common law, "the word 'element' refers to a constituent part of a crime which must be proved by the prosecution to sustain a conviction."[19] As pointed out by Justice Thomas concurring in *Apprendi v. New Jersey*,[20] Bishop refers to the elements as "whatever is in law essential to the

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[17] " . . . the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. 1, 188, 6 L.Ed. 23, 9 Wheat. 1 (1824).

[18] 97 S.Ct. at 1354.

[19] *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1215 (CA 9, 2002).

[20] *Apprendi v. New Jersey*, 530 U.S. 466, 510, 120 S.Ct. 2348, 2373, 147 L.Ed.2d 435 (2000).

punishment sought to be inflicted"[21] and as "that wrongful aggregation out of which the punishment proceeds."[22] And the "elements" of an offense have been described as "those facts legally essential to the punishment to be inflicted."[23] A "judicial acquittal" in a jury trial, then, is the termination of the trial by the trial judge, however labeled by the judge, by actually resolving,[24] correctly or incorrectly, one or more of the constituent parts of the crime charged – one or more of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction.

Under the test enunciated in ordinary language in *Martin Linen*, a termination of the trial on a defendant's motion by a resolution by the trial judge of something *other* than "one or more of the factual elements of the offense charged" – something *other* than one or more of the constituent parts of the crime

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[21] 1 J. Bishop, *Law of Criminal Procedure* § 50 (2d ed. 1872).

[22] 1 J. Bishop, *New Criminal Procedure* § 84, p. 49 (4th ed. 1895).

[23] See, for example, *Harris v. United States*, 536 U.S. 535, 561, 122 S.Ct. 2406, 2416, 153 L.Ed.2d 524 (2002); *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004).

[24] "Resolving" in this context does not mean "being persuaded," but means that the judge makes a finding that, taking the evidence in the light most favorable to the prosecution, no reasonable juror *could* be persuaded of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

charged, one or more of those facts legally essential for punishment to be inflicted – is not an acquittal, and jeopardy does not bar appeal and retrial. Has this Court in any subsequent case or cases undermined what it said in ordinary language in *Martin Linen*? It has not. This Court has continued to employ the *Martin Linen* formulation of that which constitutes an "acquittal" – a "factual elements of the offense charged" test – through as recently as the last term of the Court.[25] And in so doing, the Court has given no hint that it no longer matters whether that resolved by the trial judge in terminating the trial is a "factual element of the offense charged."

(2) Petitioner's modification of *Martin Linen* to divorce that which must be resolved by the trial court's action from the "factual elements of the offense charged" is inconsistent with that decision

Petitioner subtly modifies the actual language of the *Martin Linen* test, so as to greatly alter its meaning. Where this Court defined a judicial acquittal as a

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[25] See, e.g., *Lee v. United States*, 423 U.S. 23, 30, 97 S.Ct. 2141, 2145, 53 L.Ed.2d 80 (1977); *United States v. Scott*, 437 U.S. 82, 97, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1977); *Sanabria v. United States*, 437 U.S. 54, 71, 98 S.Ct. 2170, 2183, 57 L.Ed.2d 43 (1978); *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct 1745, 1748, 90 L.Ed.2d 116 (1986); *Smith v. Massachusetts*, 543 U.S. 462, 468, 125 S.Ct. 1129, 1134, 170 L.Ed.2d 914 (2005); *Blueford v. Arkansas*, ___ U.S. ___, 132 S.Ct. 2044, 2050, 182 L.Ed.2d 937 (2012).

resolution, correct or not, of some or all of the factual elements of the offense charged, Petitioner reframes the test as "a trial court ruling, whatever its label, correct or not, finding that the prosecution had *failed to prove the defendant's guilt*."[26] The latter is scarcely simply a different way of stating the former; they are as like as chalk and cheese. Petitioner's formulation removes from this Court's test the requirement that the trial court's ruling "actually" resolve – whether correctly or incorrectly – one or more of the "factual elements of the offense charged," so that, under Petitioner's test, if the ruling is one that *purports* to find that the prosecution had "failed to prove the defendant's guilt," then *that* ruling, whether correct or not, constitutes an acquittal, *whatever* its basis, which may have nothing whatsoever to do with the "factual elements of the offense charged," as was the case in the trial judge's ruling in the present case. None of this Court's cases following *Martin Linen* in any way suggest that the requirement that the resolution of the trial judge, whatever its label, and whatever its correctness, be of one or more of the "factual elements of the offense charged," is actually irrelevant to the inquiry; as Respondent has noted, this Court quoted the "one or more of the factual elements of the offense charged" language of *Martin Linen* only last term.

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[26] Petitioner's Brief, p. 13.

Petitioner attempts to remove the "factual elements of the offense charged" from the test – that removal being essential to his obtaining relief – by reference to several cases of this Court which in fact quote the "factual elements of the offense charged" language. Perhaps central to Petitioner's claim is *United States v. Scott*.[27] There the defendant moved both before and during trial for dismissal of several counts of the indictment on the ground of prejudicial preindictment delay, and the trial court granted the motion at the end of the government's case. The government's attempt to appeal was properly rebuffed by the Sixth Circuit because of the holding in *United States v. Jenkins*[28] that jeopardy was offended if "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. . . ." But this Court overruled *Jenkins*, though the case had been decided only three terms previously, concluding that the case "placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empaneled to try him so as to include those cases *where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence*."[29] So here; that the structure burned not be

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[27] *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1977).

[28] *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975).

[29] *Scott*, 98 S.Ct. at 2191 (emphasis supplied).

a dwelling no more related to "factual guilt or innocence" of the offense charged than a requirement that the structure burned be blue.

There is no inconsistency between *Scott* and *Martin Linen*, nor does *Scott* modify *Martin Linen* in any way. Petitioner emphasizes that the line drawn by *Scott* distinguishing acquittals from other defendant-consented-to terminations of the trial is that with the latter the termination must be based on grounds "unrelated to factual guilt or innocence." But this does not undermine the "factual elements of the offense charged" portion of the *Martin Linen* test, unless one allows the "form of the action" or the label employed by the trial judge to control, which is precisely what Petitioner does. In what sense was the ruling of the trial judge here a "finding that the prosecution had failed to prove the defendant's guilt," as Petitioner reformulates the test? Only in the sense that the trial judge *said that's what she was doing*. Set aside the label, or form of the action, however, and it is plain that the trial judge did *not* resolve – not even incorrectly – *any* of the "factual elements of the offense charged." Petitioner admits this is so; his statement of the question says that the trial judge "erroneously held a particular fact to be an element of the offense." Because the trial judge terminated the trial *without* resolving, correctly or incorrectly, any element at all of the offense charged, the ruling of the trial judge was, by definition, "unrelated to the factual guilt or innocence" of the defendant of the offense charged. To say otherwise renders the "factual

elements of the offense charged" language of *Martin Linen* entirely meaningless.

Nor do any other of this Court's cases cut the *Martin Linen* acquittal test loose from its moorings to the factual elements of the offense charged. Petitioner cites *Sanabria v. United States*,[30] but in so doing is "wounded in the house of his friends."[31] *Sanabria* in fact applies *Martin Linen* to find an acquittal where the trial court found the proofs on one of the "factual elements of the offense charged" insufficient. Whether that insufficiency was *caused* by an erroneous evidentiary ruling of the trial court is of no moment under *Martin Linen*; the question was and is, did the trial judge, correctly or incorrectly, resolve one or more of the factual elements of the offense charged? He did in *Sanabria*, where this Court applied the "factual elements of the offense charged" test to so conclude. This Court specifically found that "the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence,"[32] citing and applying *Martin Linen*, and clearly focusing on the factual elements of the offense as critical to its decision – " . . . petitioner here was acquitted for insufficient proof *of an element of the*

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[30] *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978).

[31] Zechariah 13:6.

[32] 98 S.Ct. at 2181.

crime. . . . This finding of fact stands as an absolute bar to any further prosecution. . . ."[33]

Petitioner also looks to *Arizona v. Rumsey*,[34] a sentencing case, for support. But in that case legal error occurred with regard to the construction of an actual "sentencing element" of the offense. The trial judge considered the factor of pecuniary gain as an aggravating circumstance, and found that this "element" or aggravating circumstance had not been shown (the judge acting as trier of fact) because he mistakenly believed that "receipt, or expectation of the receipt, of anything of pecuniary value" referred only to murders for hire, when actually proof that the murder was committed to obtain money would have been sufficient to *prove* the aggravating circumstance. This Court held that the misconstruction of the "pecuniary gain" aggravating circumstance by the trial judge did not change the fact that the judge, as trier of fact, had "acquitted" the defendant of this "element." But in the present case the trial judge did not require particular *proof* on an element – on a factual element that the *statute* required be proven by the prosecution – but required proof of a faux factual element that the legislature had not made part of the "offense charged." *Rumsey* is thus inapposite.

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[33] 98 S.Ct. at 2183 (emphasis supplied).

[34] *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2304, 81 L.Ed.2d 164 (1984).

Smith v. Massachusetts[35] is also cited by Petitioner. Again, there is no question that an actual element – one of the factual elements of the offense charged – was "resolved" by the trial judge, though the judge made a mistake of law. As this Court noted, the element at issue was that the firearm involved have a barrel of less than 16 inches in length. No specific proof on length was presented, and the trial judge found that no reasonable juror could find guilt beyond a reasonable doubt on that element. After granting defendant's motion for acquittal, and after the trial had proceeded through the defense case, the prosecutor showed the trial judge an appellate precedent to the effect that testimony as to the *kind* of gun was sufficient to allow a finding on the length of the barrel. The trial judge then reversed her ruling on the judgment of acquittal. In a straightforward application of *Martin Linen*, this Court found that defendant had been acquitted because the trial judge had resolved a factual element of the offense charged, even if she had done so incorrectly.[36]

And so *Martin Linen*'s requirement that what is "resolved" by the trial judge in terminating the trial be one or more of the "factual elements of the offense

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[35] *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129, 170 L.Ed.2d 914 (2005).

[36] The "more difficult question" the Court faced was whether the trial judge could reconsider her ruling as she did, a question this Court answered in the negative, in the absence of a court rule so allowing.

charged" has not been altered by this Court. Several cases from other jurisdictions illustrate the point. In *Commonwealth v. Hosmer*,[37] a decision of the Massachusetts Appeals Court, during the examination of the Commonwealth's first witness, the prosecutor moved to amend the information to reflect that the offense charged had occurred a day earlier than stated in the charging document. Defense counsel objected, and the judge denied the motion and terminated the trial. The Commonwealth acknowledged on appeal that the judge uttered, "not guilty," as he left the bench, and the District Court docket, by a check mark, recorded a finding of not guilty.[38]

The Court of Appeals agreed that "If there was a finding of not guilty, principles of double jeopardy prevent a retrial of the defendant on the same charge." But, said the court,

> [i]n considering "the exact nature of the action taken by the District Court judge," . . . we are not bound by labels or checkmarks on a form, but we inquire whether there was a resolution of any of the facts *that make up the offense charged*. We conclude that the judge dismissed the Commonwealth's complaint, and that this was an abuse of discretion for the "date is not an essential ingredient of the offense. . . ."[39]

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[37] *Commonwealth v. Hosmer*, 727 N.E.2d 537 (Mass. App. 2000).

[38] *Hosmer*, at 538.

[39] *Hosmer*, at 538, 539 (emphasis supplied).

The court concluded that the trial judge, despite his characterization of his actions as an acquittal, had aborted the trial on grounds unrelated to guilt or innocence.

And in *United States v. Maker*[40] the third circuit, pointing to several *post-Martin Linen* decisions,[41] found that it is "generally understood" that the test for an acquittal is "only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant *a factual element necessary for a criminal conviction*." Thus the appeal of the government in the case before it, the court concluded, was "barred only if the district court's legal determination about the elements of a single scheme conviction is correct."[42] Because that ruling was incorrect, the trial court misunderstanding the actual elements of the offense, the government appeal, and retrial, were not precluded by jeopardy.[43]

Similarly, in *State v. Korsen*[44] the State appealed a directed verdict of acquittal, and the Idaho Supreme Court framed the issues as first, "Did the

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[40] *United States v. Maker*, 751 F.2d 614, 622 (CA 3, 1984) (emphasis supplied).

[41] *Carter v. Estelle*, 677 F.2d 427, 452-453 (CA 5, 1982); *United States v. Dahlstrum*, 655 F.2d 971, 974 (CA 9, 1981); *United States v. Moore*, 613 F.2d 1029, 1037 (CA DC, 1979); *Sedgwick v. Superior Court for the District of Columbia*, 584 F.2d 1044, 1049 (CA DC, 1978).

[42] *Maker*, 751 F.2d at 622.

[43] *Maker*, 751 F.2d at 623-624.

[44] *State v. Korsen*, 69 P.3d 126 (Idaho, 2003).

magistrate err by granting Korsen's Rule 29 motion for acquittal based upon the State's failure to prove a legitimate reason for asking Korsen to leave the premises, when the statute has no such requirement as one of its elements?"; and second, "Is Korsen protected by double jeopardy principles from a retrial on the trespass charge?"[45] The court, citing the test of *Martin Linen,* found that the lower court "as a result of legal error, determined that the government could not prove a fact that is not necessary to support a conviction," so that what had occurred was not an acquittal, and appeal and retrial were thus not barred.[46]

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[45] *Korsen*, 69 P.3d at 131.

[46] *Korsen*, 69 P.3d at 137. Petitioner cites several cases for the opposite proposition. In *State v. Lynch*, 399 A.2d 629 (N.J., 1979) the court found the situation analogous to that in *Sanabria*; that is, "The trial court's interpretation of the statute, though erroneous, led to prohibiting the admission of certain evidence, a ruling which may be 'characterized as an erroneous evidentiary ruling,' which in turn caused the acquittal for insufficient evidence." 399 A.2d at 636-637. The Minnesota Supreme Court in *State v. Large*, 607 N.W.2d 774 (Minn., 2000) also found *Sanabria* controlling, citing the same language. And in *Carter v. State*, 227 S.W.3d 895 (2006), the Supreme Court of Arkansas found that a finding of insufficiency of evidence of aggravation in an aggravated armed robbery case based on a legal error as to that which was necessary to prove aggravation was nonetheless an acquittal of that charge. To the extent that *Carter* may be read to find that an acquittal occurs when the trial judge resolves something other than "one or more of the factual elements of the offense charged," Respondent submits that it is mistaken for the reasons argued previously.

(3) The Michigan Supreme Court decision is a faithful application of the *Martin Linen* acquittal test

The Michigan Supreme Court here applied the *Martin Linen* test, taking the words to mean what they say. The court reviewed the cases by this Court discussed above, and concluded that "each of these cases involves evidentiary errors regarding *the proof needed to establish a factual element* of the respective crimes at issue."[47] There is "a constitutionally meaningful difference," said the court, between the present case, "in which the trial court identified an extraneous element and dismissed the case solely on that basis, and *Rumsey, Smalis*, and *Smith,* in which the trial courts made evidentiary errors regarding how to prove the governing law."[48] An "acquittal for double-jeopardy purposes is a 'ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the *factual elements* of the offense charged.'" Here, "the trial court did not resolve or even address any factual element necessary to establish a conviction for burning other real property." The ruling was "based on an error of law unrelated to defendant's guilt or innocence on the elements of the charged offense, and thus the trial court's dismissal of the charge did not constitute an acquittal."[49] This is an application of *Martin Linen*

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[47] 491 Mich. at 14, 810 N.W.2d at 542 (emphasis supplied).

[48] 491 Mich. at 15, 810 N.W.2d at 543.

[49] 491 Mich. at 20-21, 810 N.W.2d at 546.

faithful to its text, and to the historical understanding of an "element" of a crime as one of the constituent parts of the crime charged – one of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction.

Petitioner, who in his reframing of the *Martin Linen* test removes all reference to the "factual elements of the offense charged,"[50] takes the Michigan Supreme Court to task on the ground that it implicitly added one word, a second "correct," to the test, so that as the Michigan Supreme Court applied it, the test reads that an acquittal occurs if the trial court's ruling, whatever its label, represents "a resolution, correct or not, of some or all of the *correct* factual elements of the offense charged." But it is not necessary to *add* the word "correct" to the test, for there are no other kinds of elements of a crime than "correct" ones. There are constituent parts of the crime charged – facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction, and there are facts unrelated to guilt or innocence of the charged offense, which may, or may not, go to proving a higher or different offense. To use the phrase, as did the Michigan Supreme Court, "extraneous element" to define something identified by the trial court as a "constituent part" of the charged offense which in fact is *not*, or the phrase "faux

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[50] Petitioner rewrites the *Martin Linen* acquittal test as "a trial court ruling, whatever its label, correct or not, finding that the prosecution had *failed to prove the defendant's guilt*."

element," employed by Respondent for the same purpose, is not to identify some different "kind" of element of the offense from the "correct" or "actual" elements, it is simply a shorthand to describe that universe of facts that do *not* constitute constituent parts of the offense charged. To add "correct" before "factual elements" in *Martin Linen* adds nothing; what else would this Court have been referring to in that case in requiring, for an acquittal, a resolution, correct or not, of one or more of the "factual elements of the offense charged"? For example, if, in a second-degree murder case, a trial judge found insufficient proof of premeditation, an element of first-degree murder but not second-degree murder, the judge would not have resolved an "incorrect element" of second-degree murder, but no element at all. Indeed, to determine whether two offenses are the "same" for double jeopardy purposes, a court must determine "whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution."[51] Could a prosecutor justify successive prosecutions or additional punishment by pointing to some fact that is not a constituent part of one of the offenses, arguing that the test is satisfied because this Court in *Blockburger*[52] and *Dixon* did not

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[51] *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); see *Wilson v. Belleque*, 554 F.3d 816, 828-829 (CA 9, 2009).

[52] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

refer to the "correct" elements? Of course not – there simply is no other kind.[53]

Petitioner seems to be rewriting the *Martin Linen* test a second way as well. The "resolution" *of* a "factual element" spoken to in that case plainly refers to a determination by the trial judge that no reasonable juror could find an element or elements proven beyond a reasonable doubt. And that resolution by the trial judge can be incorrect.[54] It may even be the result of erroneous evidentiary rulings, or of a misunderstanding as to that proof which is necessary to establish the element or elements in question. Petitioner in effect rewrites *Martin Linen*'s test to say that an acquittal occurs where the trial court's ruling, whatever its label, represents "a resolution, correct or not, *of that which the trial judge identifies as an element, correctly or not*, of the offense charged." But *Martin Linen* does not speak to the legal question of determining those "ingredients"[55] which make up the

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[53] And it has often been said that the trial judge has a duty "to tell a jury what facts they must find before they can convict – that is, to instruct the jury as to the elements of the crime charged." See, e.g., *United States v. Baird*, 134 F.3d 1276, 1283 (CA 6, 1998). Surely this duty cannot be satisfied by a misinstruction on the elements, on the ground that it is never said that the duty of the court is to instruct on the "correct elements" of the crime. There are *only* "correct" elements.

[54] See *United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975).

[55] See *Apprendi v. New Jersey*, 530 U.S. 466, 500, 120 S.Ct. 2348, 2368, 147 L.Ed.2d 435 (2000) (Thomas, J., concurring).

offense charged, allowing *that* determination to be legally incorrect, but, again, to the determination by the trial judge that, as a matter of law, no reasonable juror could find an element or elements proven beyond a reasonable doubt, whether *that* determination be correct or not. The "correct or not" language in the test enunciated by the Court refers to the resolution "*of*" an element, not to a determination of what the elements *are*. To say otherwise is to say that "factual elements of the offense charged" in the *Martin Linen* test has no meaning, and that this Court did not say what it meant in that case.

(4) Petitioner's policy arguments are unavailing

Petitioner argues that reading the acquittal test of *Martin Linen* to mean what it says would allow appeals from jury acquittals, encourage prosecution appeals from directed verdicts or judgments of acquittal entered by taking the case from the jury, and is too difficult to apply, being essentially a matter of "semantics." Petitioner is mistaken. Certainly no appeal from a jury verdict of acquittal can be taken even where the jury is instructed on the need to find a "faux element" proven beyond a reasonable doubt. Jury verdicts are general, and there would be no way of knowing what led the jury to acquit. Jeopardy *terminates* or concludes upon a jury acquittal;[56] this

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[56] See section C, infra.

Court held long ago that appeals from actual verdicts of acquittal are not permitted.[57]

And *Martin Linen*'s acquittal test, referring to actual resolutions of one or more of the factual elements of the offense charged, has been in existence for 35 years, the *Scott* decision, allowing retrial when the trial is terminated with defendant's consent on a ground unrelated to factual guilt or innocence, for 34 years, and the *Maker* decision for 28 years. Prosecutors, were they so inclined, have had every reason to believe that whatever the label or form of the action, if the trial was terminated by the trial judge with the consent of the defendant and by a resolution of something *other* than one or more of the factual elements of the offense charged, taking an appeal is possible, as no acquittal has occurred and so double jeopardy does not preclude a second trial. Yet there are few such appeals when trial judges enter directed verdicts of acquittal or judgments of acquittal, and this is because trial judges *do not commonly mistake the elements of the offense charged.* When prosecutors disagree with these terminations of the trial, it is ordinarily because the prosecutor disagrees with the trial judge's assessment that, taking the evidence in the light most favorable to the prosecution, no reasonable juror could find guilt beyond a reasonable doubt, the trial judge perhaps having acted as 13th

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[57] *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904).

juror.[58] Appeal in this situation is precluded by *Martin Linen*. Less often, the prosecution may feel aggrieved by a directed verdict or judgment of acquittal that terminates a jury trial because the prosecution feels an erroneous evidentiary ruling caused the insufficiency of the evidence. Appeal is precluded by *Martin Linen* and *Sanabria*. And even less often, the prosecution may feel aggrieved by a directed verdict or judgment of acquittal that terminates a jury trial because the prosecution feels that the trial court found the evidence inadequate to prove a factual element of the offense charged by misunderstanding the proofs necessary to establish that element. *Martin Linen, Rumsey* and *Smith* disallow retrial in this

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[58] See *United States v. Freeman*, 208 F.3d 332, 343 (CA 1, 2000): "Our trial system makes a sharp distinction between functions: the judge is 'not a thirteenth juror, much less [is] he a super-juror whose views of credibility could override the jury's verdict.' . . . Accordingly, . . . the court . . . must take the evidence in the light most favorable to the government in ruling on a motion for a judgment of acquittal."

And see Richard Sauber, Michael Waldman, "Unlimited Power: Rule 29(A) and the Unreviewability of Directed Verdicts of Acquittal," 44 Am. U. L. Rev. 433 (1994).

Judicial intrusion into matters that should be left to the jury has long been a concern, in both civil and criminal cases. As Professor Thayer said long ago, while a jury verdict "must not be absurd or whimsical," this is "a different thing from imposing upon the jury the judge's own private standard. . . . judges do not undertake to set aside the verdict because of their own opinion of the conduct in question differs from the jury's. They are not an appellate jury. . . . We might anticipate that this clear but delicate line would often be overstepped. It often has been." Thayer, *A Preliminary Treatise on Evidence* (1898), p. 208-210.

situation, as the trial judge has, nonetheless, resolved, even if incorrectly, one of the actual factual elements of the offense charged.

Nor is the matter one of "semantics." In *Smith*, for example, the factual element involved was the length of the barrel of the weapon. The trial judge erred in finding that only direct testimony as to length was sufficient, when circumstantial evidence – testimony as to the type of weapon – would do. The judge thus erred in finding the evidence presented insufficient to show a factual element. If the judge had instead required proof that the weapon was a blue steel revolver, or that it was possessed in a school, any reasonable person could readily discern that proof of some fact not a constituent part of the offense had been required. And where a trial judge requires proof of an element that actually belongs to a greater offense, such as premeditation in a second-degree murder case, or as here, proof of the *absence* of that greater element, it is apparent that proof of a fact not a constituent part of the offense has been required. The trial judge here did not find that the proof that real property was burned was insufficient by misconstruing the sort of proof adequate to make that showing. Instead, she required proof of an additional fact not a constituent part of the offense charged, just as if she had required that the prosecution prove the structure was of a certain value, or was blue in color, neither of which are required by the statute.

And so if this Court affirms the Michigan Supreme Court's holding that where the defendant consents to the termination of the trial by requesting and gaining a resolution of something *other* than one of the "factual elements of the offense charged," nothing will have changed. In considering whether to allocate increasingly scarce resources to a possible appeal, prosecutors will still be required to assess whether the trial judge's action was, whatever its label, a resolution, even if incorrect, of one or more of the factual elements of the offense charged, or was instead a resolution of something *other* than one of the constituent parts of the crime charged which must be proved to sustain a conviction.

(5) Conclusion: retrial is permitted when a trial is terminated at the request of a criminal defendant by a resolution of something other than a factual element of the offense charged, as no acquittal has occurred, but instead a termination of the trial on a ground unrelated to actual guilt or innocence

Petitioner here urged upon the trial court a termination of the trial on a resolution of a "fourth element" – that the structure burned *not* be a dwelling – that the prosecution was not, under the statute passed by the legislature,[59] required to prove. The

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[59] As this Court said in *Sanabria*, "Congress [the legislature] . . . establishes and defines offenses. . . . once Congress has

(Continued on following page)

trial judge resolved something other than one of the "factual elements of the offense charged," a point conceded throughout all appellate proceedings. She did not resolve one of the constituent parts of the crime charged – one or more of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction, and so no acquittal occurred. Petitioner's proposed modification of *Martin Linen* turns the storied protections of the Jeopardy Clause into a parlor trick, or game of "heads I win, tails you lose." Should the defendant convince the trial judge to terminate the trial by concluding that as to one of the factual elements of the offense charged, no rational juror could, on the evidence presented, find that element proven beyond a reasonable doubt, the defendant, even if the ruling is incorrect, "wins"; should the defendant convince the trial judge to terminate the trial by concluding that, as to some fact that is *not* a constituent part of a crime which must be proved by the prosecution to sustain a conviction, no rational juror could, on the evidence presented, find that fact proven beyond a reasonable doubt, the prosecution loses.

Because that the structure burned here *not* be a dwelling was not one of the "factual elements of the offense charged," the termination of the trial on this

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defined a statutory offense by its prescription of the 'allowable unit of prosecution,' . . . that prescription determines the scope of protection afforded by a prior conviction or acquittal." 98 S.Ct. at 2181.

basis was a termination on a ground unrelated to the factual guilt or innocence of the Petitioner on the offense charged. The Michigan Supreme Court correctly held that jeopardy does not bar retrial.

C. *Martin Linen* Revisited: a "Directed Verdict" or "Judgment of Acquittal" Entered by the Court in a Jury Trial Without A Verdict From That Body Is a Ruling of Law, and Reversal of that Ruling Leads to a Second Trial Within the Original Jeopardy

(1) Introduction

In *Smith v. Massachusetts*,[60] this Court observed that it has "long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict. . . . This is so whether the judge's ruling of acquittal comes in a bench trial or, as here, in a trial by jury."[61] And this despite the fact that, as the Court itself pointed out, "the common-law protection against double jeopardy historically applied only to

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[60] *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129, 170 L.Ed.2d 914 (2005).

[61] 125 S.Ct. at 1133-1134, the Court citing *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962), *Sanabria*, and *Martin Linen*. Respondent would note that an acquittal by a judge at a bench trial is a *verdict*, not a "ruling" of law, as is a judgment of acquittal entered in a jury trial.

charges on which a jury had rendered a verdict. . . ."[62] Earlier, in its overruling of the *Jenkins* decision in *United States v. Scott*,[63] the Court took note of Justice Holmes' dissent in the *Kepner*[64] case, remarking that "Mr. Justice Holmes' concept of continuing jeopardy would have greatly simplified the matter of Government appeals, but it has never been accepted by a majority of this Court."[65] Because a "verdictless judgment" – which is what the modern judgment of acquittal is – does not form a part of the historical backdrop of the Jeopardy Clause, reconsideration of the foundations of *Martin Linen* is appropriate, particularly given that this Court in *Fong Foo* and its progeny has never explained the leap from a double jeopardy protection "historically applied only to charges on which a jury had rendered a verdict" to the present practice of application of that protection to what are essentially "verdictless" judicial judgments in jury trials. These judgments are rulings of law,[66] can be mistaken, and *should* be reviewable on appeal.

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[62] 125 S.Ct. at 1133, citing 2 M. Hale, *Pleas of the Crown* 246.

[63] *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978).

[64] *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904).

[65] *Scott*, 98 S.Ct. at 2193. See also *Jenkins*, 95 S.Ct. at 1006.

[66] See *Wilson*, supra, 95 S.Ct. at 1023, referring to the "postverdict ruling of law" under consideration there.

A form of Justice Holmes' "continuing jeopardy" formulation, Respondent submits, would, as this Court said in *Scott*, "simplify the matter of Government appeals," and do so *without* permitting Government appeals of *verdicts* of acquittal rendered by juries, or by judges acting as factfinder in cases where trial by jury is waived.[67] As Justice Holmes said, "there can be but one jeopardy in one case."[68] The question becomes, when does that jeopardy *conclude*? Respondent submits that the jeopardy that continues in "one case" should be viewed as having concluded, once it has attached, by 1) a termination of the trial short of verdict without the defendant's consent and without manifest necessity; 2) a termination of the trial short of verdict *with* the defendant's consent, deliberately provoked by the prosecuting official;[69] 3) a final verdict of guilty,[70] 4) a *verdict* of

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[67] And this Court has applied the principle of "continuing jeopardy" in other circumstances. See *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984).

[68] *Kepner*, 24 S.Ct. at 807.

[69] *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

[70] That is, jeopardy continues through the defendant's direct appeal, so any retrial ordered for prejudicial error is a part of the "original" jeopardy; " . . . the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy, in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record. . . . The reason . . . is that there can be but one jeopardy in one case." *Kepner*, 24 S.Ct. at 807.

acquittal,[71] 5) a final post-judgment determination that the evidence is insufficient to support a verdict of guilty.[72] But a termination of the trial short of verdict *with defendant's consent* that was not deliberately provoked by the prosecuting official should not terminate jeopardy, so that prosecution appeals, even from "verdictless judgments" in defendant's favor, should be permitted.

(2) The "Directed Verdict" Was An Instruction to the Jury, Not A Verdict By the Court

The "directed verdict" of acquittal in the modern sense – the termination of the trial on the defendant's motion without submission of the case to the jury for its decision – was unknown at the time of the founding. Indeed, the notion of "directing" a jury to reach a particular decision is at best awkward, and so today, both in civil and criminal cases, in some jurisdictions a different nomenclature is employed. For example, in federal civil cases the former "directed verdict" is now known as a "motion for a judgment as a matter of law," allowing the granting of judgment "as a

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[71] "As regards a new trial after acquittal, 'It was never known,' said Chief Justice Pratt, in 1724, 'that a verdict was set aside by which the defendant was acquitted, in any case whatsoever upon a criminal prosecution.'" Thayer, p. 175. And see discussion at p. 175-179.

[72] *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

matter of law" on a claim or defense if the court finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. . . ."[73] In federal criminal cases, what was once known as a motion for a "directed verdict of acquittal" is now a motion for "a judgment of acquittal," which is to be granted "if the evidence is insufficient to sustain a conviction."[74] The Advisory Committee Note states that the purpose of the change from motion for "directed verdict" to motion for "a judgment of acquittal" was simply "to make the nomenclature accord with the realities," for modernly, judges do not instruct juries to return particular verdicts, and judgment is entered without a verdict. Modern judges determine whether, *as a matter of law*, there is sufficient evidence to allow a reasonable juror to find guilt beyond a reasonable doubt on a factual element or elements. Trial judges *can be wrong* in making this decision, as can appellate courts, and, under current doctrine, where no further trial is required, may be reversed, as when a judge grants such a motion *after* a jury has returned a verdict of guilty, or when an intermediate appellate court reverses a conviction on insufficient evidence. What, then, is an "acquittal," bearing in mind that labels placed by judges on their actions do not control?

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[73] Federal Rules of Civil Procedure, Rule 50.

[74] Federal Rules of Criminal Procedure, Rule 29.

(a) An acquittal is a verdict delivered by the factfinder

An acquittal is a *verdict*. Legal dictionaries from the 18th and early 19th centuries define "acquittal" and "verdict" inconsistently with the modern termination of the trial on a judicial finding that, as a matter of law, there is insufficient evidence from which a jury could reach the conclusion of guilt, a finding that does not involve the weighing of evidence or assessment of the credibility of witnesses. For example, Jacob's *A New Law Dictionary* (1729) defines "Verdict" as " . . . the Answer of a Jury given to the Court, concerning the Matter of Fact in any Cause committed to their Trial . . . A General Verdict is that which is brought into Court in like general terms to the General Issue; as if a Defendant pleads Not guilty, or no Wrong, then the Issue is general, whether he be guilty, or the Fact be a wrong, or not. . . ." "Acquittal" is defined as " . . . a Deliverance and Setting free from the Suspicion of Guilt; as he that on Trial is discharged of a Felony, is said to be *Acquietatus de Felonia*; and if he be drawn in Question again for the same Crime, he may plead *auter foits acquit*. . . . *Acquittal in Fact* is when a Man is found Not guilty of the Offense by a jury, on Verdict. . . ."[75]

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[75] Giles Jacob, *A New Law Dictionary* (1729). See similarly, Richard Burn, *A New Law Dictionary* (1792); Thomas Potts, *A Compendious Law Dictionary* (1815); Thomas Walter Williams, *A Compendious and Comprehensive Law Dictionary* (1816)

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(b) The "directed verdict" was an instruction to the jury; taking the case from the jury is a modern development

Until well into the 19th century, the "directed verdict" was not a ruling by the court granting judgment without verdict, but an instruction to the jury. At the time of the framing, juries had long since ceased being composed of witnesses to the event in controversy, and performed no investigatory function, being judges of the facts in legal controversies. As jury trial developed in England, though juries were free to render that verdict they believed appropriate, rendering a verdict in opposition to the direction of the court could lead to fine and imprisonment of the jurors. Finally, in 1670 in *Bushel's Case*[76] it was established that a jury could not be punished for its verdict, even if contrary to instructions and the

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("*when a person is found not guilty of the offence by a jury, on verdict, he is acquitted in fact*" (emphasis supplied)).

Respondent would include all verdicts, including those found by a judge at a bench trial. The bench trial was largely unknown in our early history, and there is no right in the defendant to a bench trial and verdict. *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). Indeed, in some jurisdictions, a waiver of the right to jury trial was held impossible absent a specific authorizing statute. See *People v. Kirby*, 440 Mich. 485, 490-491, 487 N.W.2d 404, 406 (1992): "While it was acknowledged that possibly with proper legislative authority, a defendant could waive his right to trial by jury, . . . waiver of a jury was recognized at this time as a substantial right only if allowed by the Legislature."

[76] *Bushel's Case*, 124 Eng.Rep. 1006 (C.P.1670).

evidence. William Penn was charged with sedition, and, though directed to convict, the jurors at first hung, and then returned a verdict on a lesser offense. The jurors were ordered to deliberate again and returned the same verdict. The court ordered them locked in the jury room "without meat, drink, fire and tobacco," until they reached a "proper verdict." After several days, the judge accepted the verdict but fined the jurors. When they refused to pay, they were imprisoned. Some paid, but Bushel and several others appealed, and the Chief Justice held that a trial court could never punish a juror for his verdict.[77]

But this did not mean that jurors could not be instructed by the court as to their "proper" verdict. The judge "could direct the jury to find for the plaintiff or for the defendant," but "the jury was not bound by the direction of the judge."[78] Indeed, into the 20th century it was held permissible in Michigan for the trial judge to direct the jury to *convict* in a criminal case. In 1886 Justice Campbell wrote for the court upholding a directed verdict of guilty:

> Complaint is also made that the court had no right to direct the jury to find a verdict of guilty. . . . Where all the facts are admitted

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[77] See Thayer, *A Preliminary Treatise on Evidence* (1898), p. 166-169.

[78] Suja A. Thomas, "The Seventh Amendment, Modern Procedure, and the English Common Law," 82 Wash.U. L.Q. 687, 729 (2004).

> there is nothing for the jury to pass upon. The judgment must be affirmed.[79]

The trial judge was, however, limited to so instructing the jury. It was required that the jury retire and deliberate, and a verdict in contradiction of the court's instructions that the duty of the jury was to return a verdict of guilty could not be overturned, nor the jurors coerced in any way.[80] And so also with directions to the jury to acquit. Judicial direction to jurors regarding verdict "was either instruction on the law or advice on the facts, or a mixture of the two. It was not a device for taking a case from a jury. . . ."[81] As Bishop put it in 1872, " . . . if the evidence, giving it full credit, does not show a crime . . . it is the duty

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[79] *People v. Richmond,* 59 Mich. 570, 573, 26 N.W. 770, 770 (1886). See also *People v. Elmer*, 109 Mich. 493, 496 67 N.W. 550, 551 (1896) (" . . . when the facts are admitted or are undisputed, it is the duty of courts to instruct juries that the facts proven constitute the offense. There was no question of fact for the jury to pass upon. *The conclusion is one of law*, and not of fact. Guilt follows, as a matter of law, when the facts are undisputed" (emphasis added)); *People v. North*, 153 Mich. 612, 117 N.W. 63 (1908); *People v. Doyle*, 160 Mich. 423, 125 N.W. 358 (1910).

[80] *People v. Doyle*, 160 Mich. at 425, 125 N.W. at 359 ("It is the right of the trial judge to instruct the jury that it is their duty to bring in a verdict of guilty, if in his judgment the evidence in the case and the law applicable thereto warrants such instruction. Having so directed, he may not go further and compel the jury to follow his instructions. If this is done, the verdict is not that of the jury, but becomes that of the court, and the constitutional right to trial by jury is denied").

[81] W.W. Blume, "Origin and Development of the Directed Verdict," 48 Mich. L. Rev. 555, 561 (1950).

of the court so to instruct the jury, and order a verdict to be rendered for the defendant."[82] Several mid-19th Century cases illustrate the point. In one, for example, it was said that "It appears by the exceptions that the defendant requested the judge to instruct the jury that there was no evidence that the beer sold by the defendant in his tenement was intoxicating; but that the court declined so to do, and left the question to the jury. Perhaps, when there is no competent evidence to support the issue by the party holding the affirmative, it is competent for the court so to instruct the jury,"[83] and in another the court held that "The omission to instruct the jury in a criminal case that the evidence does not prove the offence laid in the indictment is good ground of exception."[84] Nor could a defendant be discharged on writ of error on the ground that the evidence was insufficient to convict. No review of factual matters was permitted on writ of

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[82] 1 Bishop, *Commentaries on the Law of Criminal Procedure*, (2d ed. 1872), § 977, p. 600.

[83] *Commonwealth v. Taylor*, 80 Mass. 26, 28, 14 Gray 26 (Mass. 1859). And see *Rex v. Doaks*, Quincy's Mass. Reports 90 (Mass. Super. Ct. 1763), where it is said that "The Jury by Direction of the Court, brought in their Verdict 'Not Guilty.' "

[84] *Commonwealth v. Merrill*, 80 Mass. 415, 418, 14 Gray 415 (Mass. 1860). And see, for example, *Budd v. People*, 143 U.S. 517, 519, 12 S.Ct. 468, 469, 36 L.Ed. 247 (1892), where "defendant's counsel requested the court to instruct the jury to render a verdict of acquittal . . . The court declined to direct a verdict of acquittal, and the defendant excepted."

error;[85] the remedy lay with the trial judge, as " . . . whenever, in a criminal case, the verdict appears not to have been warranted by the evidence, a new trial will be granted."[86] Indeed, it was not until 1978 that this Court, overruling its prior decision in *Bryan v. United States*,[87] held that retrial is not permitted

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[85] 3 Blackstone, *Commentaries on the Laws of England* (1768) p. 405-406: "A writ of error lies from some supposed mistake in the proceedings. . . . [it] only lies upon matters of law arising from the face of the proceedings, so that no evidence is required to substantiate or support it: and there is no method of reversing an error in the determination of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict."

In England, as late as Stephen's 1883 treatise, the lack of the ability to review verdicts for evidentiary sufficiency was lamented by the author: "In relation to the verdict of the jury, two matters only require notice, namely, the rule that the jurors must be unanimous, and the right of the jury to return whatever verdict they think right without being subject to be punished at the will of the court." "No provision whatever," Stephen observed, "is made for questioning the decision of a jury on matters of fact." "However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed." Stephen suggested the remedy of new trial. 1 Stephen, *History of the Criminal Law of England* (1883): p. 304, 312-315.

[86] 1 Bishop, § 1104, p. 696. And see Thomas, 82 Wash. U. L.Q. at 730 ("Cases do show that the court might order a new trial if the jury did not follow the direction of the judge").

[87] *Bryan v. United States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 334 (1950).

where on appeal it is finally held that the evidence at trial was insufficient to support the verdict of guilt.[88]

As time passed, there grew up judicial methods of "controlling the jury and correcting their errors,"[89] beyond "the method of granting new trials when the verdict was unreasonable, without punishing the jurors,"[90] such as nonsuit and demurrer.[91] And so when it was determined that the sufficiency of the evidence is a question of law, the entering of judgment by taking of the case from the jury no longer appeared, in civil cases, to violate the right to jury trial.[92] The entertaining of a motion for acquittal in criminal cases, and the entry of judgment without verdict, were a part of this "evolutionary trend which . . . increased the supervisory role of the judge over the trial process."[93] It has been said that the judges in this country began to utilize the directed verdict in civil cases to grant judgment in the 19th century, and that the "motion for judgment of acquittal in criminal cases came still later and was probably influenced by

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[88] *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

[89] Thayer, at p. 137.

[90] Thayer, at p. 139.

[91] Blume, at p. 562 ff.

[92] "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659, 55 S.Ct. 890, 892, 79 L.Ed. 1636 (1935).

[93] Theodore W. Phillips, "The Motion for Acquittal: A Neglected Safeguard," 70 Yale L.J. 1151 (1961).

these earlier developments in the civil trial."[94] As one commentator has put it, "the power to direct an acquittal developed as a corollary to the directed verdict in civil cases, with little apparent thought or reasoning."[95] And, importantly, when this authority was codified in 1907 for the federal courts, the government did not have, as is true in many jurisdictions today, the statutory authority to appeal consistent with allowance of the Jeopardy Clause on retrials, but virtually no right to appeal at all.[96]

And so today, cases may be taken from the jury when, taking the evidence in the light most favorable to the opposing party, as *a matter of law* the movant – which, in a criminal case, can only be the defendant – is entitled to judgment; that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as *a matter of law*"[97] is a question the court may resolve.

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[94] Phillips, 70 Yale L.J., at 1152.

[95] Richard Sauber, Michael Waldman, "Unlimited Power: Rule 29(A) and the Unreviewability of Directed Verdicts of Acquittal," 44 Am. U. L. Rev. 433, 434 (1994)

[96] Sauber and Walman, 44 Am. U. L. Rev. at 434.

[97] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S.Ct. 2505, 2512 (1986) (emphasis added).

(3) *Autrefois acquit* requires a verdict

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of *autrefois acquit* and *autrefois convict*. Blackstone stated that:

> . . . the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once *fairly found not guilty* upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.[98]

Blackstone also observed that the:

> . . . plea of autrefois convict, or a former conviction for the same identical crime . . . is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. . . .[99]

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[98] 4 *Blackstone's Commentaries* 335 (emphasis supplied).

[99] 4 *Blackstone's Commentaries* at 329-331.

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal."[100]

This tradition of the pleas in bar of *autrefois acquit* and *autrefois convict*, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists.[101] New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."[102] Courts in other states also recognized this form of plea in bar.[103] This rich history was thus before the First Congress which proposed the Bill of Rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence. . . ."[104] The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The

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[100] See Francine Ward, "The Double Jeopardy Clause of the Fifth Amendment," 26 Am. Crim. L. Rev. 1477, 1479 (1989).

[101] See, e.g., the Massachusetts Body of Liberties of 1641.

[102] N.H. Const., art. I, sec. 16 (1784).

[103] See Ward, 26 Am. Crim. L. Rev. at 1480-1481.

[104] 1 Annals of Cong. 434.

language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial even where sought by the defendant on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment Jeopardy Clause, referring, significantly, to *one jeopardy*, rather than *one trial*.

Thus, our Jeopardy Clause is an amalgam of common law pleas in bar, which required an actual verdict in a prior proceeding before the bar of *autresfois acquit* could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double Jeopardy Clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him.*"[105] And in *Ball v. United States*[106] this Court found the retrial of Ball, who had been acquitted by the "verdict of the jury," improper, as Ball had been "discharged by the circuit court by reason of his acquittal by the jury, and not by reason of any insufficiency in the indictment. . . ." and so the "verdict of acquittal was final, and could not be

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[105] Story, 3 *Commentaries on the Constitution* (1833) § 1781, p. 659 (emphasis added).

[106] *Ball v. United States*, 163 U.S. 662, 667, 16 S.Ct. 1192, 1193, 41 L.Ed. 300 (1896).

reviewed . . . without putting him twice in jeopardy, and thereby violating the constitution."[107]

(4) *Fong Foo*: the creation of the doctrine of "judicial acquittals" as verdicts

The development of the modern doctrine of "judicial acquittals"[108] in jury trials, and their relationship to the jeopardy protection, began in the early 1960's with *Fong Foo v. United States*.[109] There, a corporation and two of its employees were brought to trial for conspiracy, as well as a substantive offense. After seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all respondents, and a formal judgment of acquittal was entered; it appears, however, that the case was not taken from the jury, but the jury "directed" to acquit, an instruction which it followed.[110] The trial judge's action was based

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[107] 16 S.Ct. at 1195.

[108] Respondent does not here refer to verdicts rendered by judges at bench trials, where, rather than serving the gatekeeper function of determining whether the evidence is sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, the judge, as factfinder, weighs evidence and assesses credibility, and renders a verdict in the same fashion as does a jury.

[109] *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

[110] See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573-574, 97 S.Ct. 1349, 1356, 51 L.Ed.2d 642 (1977), where the Court discussed the argument of the Government that "the

(Continued on following page)

on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. This Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the judgment was "final and could not be reviewed." In its per curiam opinion, which stretches to amount to a page and one half, the Court announced this conclusion without any discussion of whether the text or history of the Jeopardy Clause compelled the result that a "judgment of acquittal" either entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protections of the double Jeopardy Clause, as the scope and purpose of that clause are revealed in history.[11]

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judge's directed verdict in *Fong Foo* was binding for double jeopardy purposes because the formal verdict of acquittal, though on direction, was rendered not by the judge, *but by the jury*, which then was discharged" (emphasis supplied).

[11] In dissent Justice Clark referred to this "so-called acquittal," and plainly believed the *label* affixed to the actions of the trial judge was not controlling: "The word 'acquittal' in this context is no magic open sesame freeing in this case two persons and absolving a corporation from serious grand jury charges of fraud upon the Government." 82 S.Ct. at 672-673.

This Court has not addressed the question since *Fong Foo*, relying on that decision for the doctrine that a "judgment of acquittal" entered at the instance of the defendant is, for jeopardy purposes, the equivalent of a jury verdict.[112] And so *Martin Linen*, taking *Fong Foo* as a given, built on that decision to define more explicitly a judicial acquittal as a "resolution, correct or not, of some or all of the factual elements of the offense charged." But a judicially entered judgment of acquittal is not a *verdict*, and indeed, it is not a "resolution" of an element or elements. Juries – or judges at bench trials – "resolve" elements, as they assess credibility and weigh evidence, to reach a conclusion as to whether the elements have been shown beyond a reasonable doubt. These tasks – weighing evidence and assessing credibility – are forbidden to the judge, when the motion is assessed appropriately, in making the determination not of whether an element has been proven to the judge's satisfaction beyond a reasonable doubt, but of whether a reasonable jury *could* so find. This is a ruling of law, and even when not marred by an improper exclusion of evidence, or a misconstruction of the proof that is required to show the element, may be *wrong*. When this is so, and so found by an appellate court, the original jeopardy should continue with a trial, the

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[112] See *Sanabria*, 98 S.Ct. at 2178-2179; *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 108 S.Ct. 1745, 1748, 90 L.Ed.2d 116 (1986) ("Our past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal under the Double Jeopardy Clause"); *Martin Linen*, 97 S.Ct. at 1354.

first trial not having concluded with a verdict; that is, with the factfinder "*fairly finding*" the defendant "*not guilty.*"

(5) Conclusion: the ruling of law, on defendant's motion, that the evidence is not sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt, terminating a trial, should be reviewable, a second trial being within the original jeopardy in the case

A termination of a defendant's trial on his or her motion based on the resolution by the trial judge, correctly or incorrectly, of some fact that is not one of the constituent parts of the crime charged – one of those facts legally essential for punishment to be inflicted – which must be proved to sustain a conviction, does not constitute an acquittal under *Martin Linen*, for no "factual element of the offense charged" has been resolved by the Court. And so this case may be resolved on that basis.

This Court has, however, on occasion revisited its jurisprudence on concluding that its holdings have become divorced from the original understanding of the right at issue. Recently, for example, in *Crawford v. Washington*[113] this Court overruled *Ohio*

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[113] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

v. Roberts,[114] though conceding that the case could be resolved "by simply reweighing the 'reliability factors' under *Roberts* and finding that Sylvia Crawford's statement falls short."[115] But the Court determined that the *Roberts* test not only led to improbable results, but was contrary to the Framer's design as expressed in the confrontation clause, as understood by reference to history.

Venerated members of this Court, speaking as a minority in *Kepner* to be sure, once expressed the view that government appeals for prejudicial error even of verdicts of acquittal are not barred by the Jeopardy Clause, there being but one jeopardy in one case.[116] And later, eight members of the Court, through an opinion by Justice Cardozo, expressed much sympathy with that view while upholding a state statute allowing government appeals from verdicts of acquittal as against a due process clause challenge. Justice Cardozo said for the Court that the dissenting opinions in *Kepner* showed "how much was to be said in favor of a different ruling" than that of the *Kepner* majority, and approached the question before the Court by asking "Is double jeopardy in such circumstances, *if double jeopardy it must be*

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[114] *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 507 (1980).

[115] 124 S.Ct. at 1373.

[116] *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904) (Holmes, J., dissenting).

called, a denial of due process forbidden to the States?"[117]

It is not necessary, of course, for this Court to revisit either *Kepner* or the overruling of *Palko* in *Benton v. Maryland*,[118] nor even to modify *Martin Linen*. Respondent submits, however, that, for the reasons stated, preclusion of a government appeal from the termination of a trial on defendant's motion based on the legal determination that the prosecution's proof is insufficient to prove guilt beyond a reasonable doubt on one or more elements is not required by the Jeopardy Clause. To paraphrase this Court in *Palko*, where the government appeals in this situation

> the state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on [where sufficient evidence on the elements *was* in actuality presented] until there shall be a [verdict from the jury]. . . . This is not cruelty at all, nor even vexation in any immoderate degree. If [a conviction of the accused had been had on insufficient proof], there might have been review at his instance. . . . [If a]

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[117] *Palko v. State of Connecticut*, 302 U.S. 319, 323, 58 S.Ct. 149, 150-151, 82 L.Ed. 288 (1937).

[118] *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

> reciprocal privilege, [when the trial is terminated at defendant's instance by a finding that no juror could find guilt proven beyond a reasonable doubt] . . . [is] granted to the state. . . . [t]here is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.[119]

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[119] 58 S.Ct. at 153.

And see Westen and Drubel, "Toward A General Theory of Double Jeopardy," 1978 Sup.Ct. Rev. 81, 155 (1979), taking the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by hypothesis, it does not depend on an assessment of credibility or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a respondent's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be *reviewed.*" And see also Am.Law Inst., Administration of the Criminal Law, Official Draft: Double Jeopardy (1935), § 13, p. 13 ("Where a person has been acquitted generally, and in the course of the trial a material error has been made to the prejudice of the State the State shall be entitled to a new trial").

CONCLUSION

WHEREFORE, the People request this Honorable Court to affirm the Michigan Supreme Court.

Respectfully submitted,

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REPLY BRIEF

No. 11-1327

In The
Supreme Court of the United States

LAMAR EVANS,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. As Petitioner's Case Demonstrates, There Is No Distinction, Much Less a Constitutionally Significant Distinction, Between a Directed Verdict Based On a Misconstruction of an Element and a Directed Verdict Based On the Addition of an Element.

Respondent and the United States recognize that this Court has held repeatedly that a trial court's legal error as to the elements of the offense does not make the decision to grant a directed verdict reviewable. But they insist that the Michigan Supreme Court was correct to draw a distinction between a legal error misinterpreting an element so as to increase the prosecution's burden and a legal error adding an element so as to increase the prosecution's burden.

As Petitioner demonstrated in his brief, this "distinction" is not just unworkable; it is entirely devoid of substance. Elements are nothing more than a set of facts which the prosecution must prove to win a conviction. There is nothing magical or talismanic about how the elements of a particular crime are numbered and organized. But, according to the Michigan Supreme Court, Respondent, and the United States, it is outcome determinative whether a particular fact that the prosecution is not actually required to prove is labeled as a gloss on an existing element or as a separate element.

This approach is directly contrary to this Court's teachings that whether an acquittal has occurred is not to be determined by labels. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("we have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action.") (citations omitted). Instead, the question is whether the trial court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Id.* at 572. That is, the question is the substantive one of whether the trial court actually made a ruling on the defendant's innocence, as opposed to a ruling intended to serve some other purpose. *See United States v. Scott*, 437 U.S. 82, 97-101 (1978).

Petitioner will not fully reprise his discussion of the trio of post-*Martin Linen* cases, *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986); and *Smith v. Massachusetts*, 543 U.S. 462 (2005). Petitioner's Brief 16-19, 23-25. In each of these cases, the Court held the trial court ruling was an acquittal even though the ruling could equally well be characterized either as adding an element to the offense or as misconstruing an element. It is telling that Respondent and the United States make no serious effort to explain why the alleged trial court errors in each of these cases could not be considered as adding elements. Instead, the best they can do is to point out that the trial courts in those cases *did not say they were adding elements.*

Rumsey proves the point. The trial court's legally erroneous conclusion – that the "pecuniary gain" aggravating circumstance required the prosecution to prove that a killing was committed pursuant to a contract – indisputably required the prosecution to prove a fact not actually found in the statute. Whether one calls that added fact an "extraneous element" or a "misconstruction of an existing element" is purely a matter of labeling.

Respondent has no answer to this point, so it simply tries to reinforce the labeling by claiming that *Rumsey* "held that the misconstruction of the 'pecuniary gain' aggravating circumstance by the trial judge did not change the fact that the judge, as trier of fact, has 'acquitted' the defendant of this 'element.'" Respondent's Brief 19. But despite Respondent's use of quotation marks, the word "element" never appeared in *Rumsey*; instead, this Court observed that "the trial court relied on a misconstruction of the *statute* defining the pecuniary gain aggravating circumstance." 467 U.S. at 211 (emphasis added).

Exactly so here; the trial court in Petitioner's case relied on the commentary to the standard criminal jury instruction, which misconstrued the *statute* with which Petitioner was charged. Absolutely nothing in *Rumsey* turned on whether the error was labeled as adding an "element" to the aggravating circumstance or as misconstruing an "element" of the aggravating circumstance.

The United States' attempt to distinguish *Rumsey* fares no better. According to the United States, the legal error in *Rumsey* "was not about the existence *vel non* of an 'element' of the crime of capital murder. Instead, as in *Smith* and *Smalis*, it was about what evidence would suffice to prove that the defendant had in fact killed for pecuniary gain." Brief of United States at 20-21.

So, according to the United States, *Rumsey* would have been an entirely different case if the trial judge, instead of ruling that the statutes "are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc.," *Rumsey*, 467 U.S. at 206, had ruled, "The pecuniary gain aggravating circumstance contains an element that the killing must be committed pursuant to contract and I find no contract here." According to the United States, if the judge had made the latter ruling instead of the former, Rumsey could have been retried even though the two rulings mean precisely the same thing. That argument thus runs directly contrary to the bedrock Double Jeopardy Clause principle "that the trial judge's characterization of his own action cannot control the classification of the action." *Scott*, 437 U.S. at 96 (quotation marks and citation omitted).

The United States' argument illustrates, perhaps better than Petitioner ever has, that the Michigan Supreme Court's "distinction" is nothing but a game of wordplay. The Double Jeopardy Clause bar does not turn on labels and it does not turn on clever semantics.

It is even more telling that Respondent and the United States have no real answer to the point that *Petitioner's case* could just as easily have been treated as a "misconstrued element" case as an "added element" case. All that Respondent and the United States can do is stress that trial counsel and the trial court *labeled* the extra fact as a "fifth element." But as Petitioner has already demonstrated, Petitioner's Brief 27, the trial judge could have made precisely the same ruling by misconstruing the second element (that "the property that was burned was a building or any of its contents") to require proof that the "building" be something other than a dwelling house.

Once again, the Double Jeopardy Clause bar on post-acquittal proceedings turns on substance, not on labels. The "distinction" the Michigan Supreme Court drew is illusory.

Respondent and the United States labor to defend that "distinction" as necessarily flowing from the Court's definition of judicial acquittal in *Martin Linen*, as a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571. But that reading of *Martin Linen* is hopelessly myopic given the Court's decisions in *Rumsey*, *Smalis*, and *Smith*, all of which turned on the trial courts' alleged addition of extra facts to the elements of the offenses. And that reading is even more myopic given *Scott*, in which this Court stressed repeatedly that the line drawn in *Martin Linen* is between a decision terminating trial proceedings

because of a finding, correct or not, that the defendant is not guilty and a decision terminating trial proceedings for other reasons.

If any more proof were needed that the Michigan Supreme Court's reading of *Martin Linen* is unsustainable, *Burks v. United States*, 437 U.S. 1 (1978), cited by both Respondent and the United States, supplies it. In *Burks*, the defendant, on trial for armed bank robbery, moved for a judgment of acquittal on the ground that the Government had failed to overcome his affirmative insanity defense. *Id.* at 3. The trial court denied the motion but the appellate court held that the Government had, in fact, failed to overcome Burks' insanity defense. *Id.* at 3-4. This Court found that the Double Jeopardy Clause barred a retrial because it was "unquestionably true that the Court of Appeals' decision 'represente[d] a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 10 (quoting *Martin Linen*, 430 U.S. at 571).

Under Respondent's and the United States' reading of *Martin Linen*, the decision in *Burks* makes no sense because the Government's failure to disprove Burks' *affirmative* insanity defense did not literally establish the absence of any of the "elements" of armed bank robbery. But *Burks*, which was decided the same day as *Scott*, makes perfect sense because both *Burks* and *Scott* recognize that the *Martin Linen* test is not dependent on the way a jurisdiction happens to group and label the elements of its offenses. Instead, the test is designed to identify those rulings

terminating proceedings because of a finding that the defendant is innocent. More precisely, the test is designed to identify those cases where "it is plain that the [trial court] evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *Scott*, 437 U.S. at 97 (quoting *Martin Linen*, 430 U.S. at 572). Or as the Court put the distinction between reviewable and non-reviewable rulings in *Burks*, "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant." 437 U.S. at 15.

If this Court were to hold that a prosecutor may appeal an acquittal so long as he or she could make an argument that the trial judge effectively added an element to the charged offense, there is no question that such appeals would routinely be filed following directed verdicts. Many defendants would be forced to live in a state of continuing anxiety throughout the appellate process, even if the acquittals were ultimately affirmed. *See Green v. United States*, 355 U.S. 184, 187-88 (1957).

The United States claims, however, that such appeals would be rare and cites as proof the dearth of such appeals in the Third Circuit following *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985). Brief of United States 25-26. But the absence of such appeals more likely proves that the federal prosecutors within the Third

Circuit have recognized that *Maker*'s interpretation of *Martin Linen* is untenable given this Court's subsequent decisions in *Scott*, *Burks*, *Rumsey*, *Smalis*, and *Smith*. By contrast, even though the Michigan Supreme Court's decision in Petitioner's case was issued only seven months ago, the Michigan Court of Appeals has already relied on it at least once to reverse a midtrial directed verdict and order a retrial.[1]

The United States denies that a ruling in its favor would permit appeals from jury acquittals, but provides no reason for this denial other than the "special solicitude" given to jury verdicts and the desire of courts to "avoid impugning the legitimacy" of such verdicts. Brief of United States 26 (internal quotation marks, brackets, and citation omitted). But given the established equivalence between jury acquittals and judicial acquittals for double jeopardy purposes, *Smith*, 543 U.S. at 467, there is no *constitutional* reason that such an appeal would not be

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[1] *See People v. Pointer*, No. 302795, 2012 WL 4840590 (Mich. Ct. App. Oct. 11, 2012). The appellate court in *Pointer* relied on the Michigan Supreme Court's decision in this case to hold that the trial court's ruling that the prosecutor had failed to overcome the defendant's *affirmative* defense under the Michigan Medical Marijuana Act was "based on an error of law that did not resolve any factual element of the crime charged." Slip Op. at 3. In other words, the Michigan Supreme Court's reading of *Martin Linen* has now led to an appellate decision directly contrary to *Burks*. Because the Michigan Court of Appeals often resolves "interlocutory" appeals with orders not posted to electronic databases, Petitioner cannot be certain that *Pointer* is the only decision so far to rely on the decision in his case to reverse a directed verdict grant.

allowed if Respondent prevails. In any case in which the prosecution can claim that the jury was effectively instructed to find an "extraneous element" and the trial record arguably shows that the "extraneous element" was the only fact in real dispute, *cf. Ashe v. Swenson*, 397 U.S. 436, 445 (1970) ("The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers."), it follows immediately that the prosecution must be allowed to claim, as Respondent does here, that the defendant was not really acquitted.

The United States cites several outlandish hypothetical examples to support its point that a defendant is not really acquitted if the judge grants a directed verdict because the prosecution failed to prove facts not found in the offense. The United States argues that a defendant would not really be acquitted of robbery if the judge ruled that no one had died in the crime, or of burning other real property based on the judge's finding that the burned building was or was not blue. Brief of United States 15.

The most obvious response to these hypotheticals is that they have nothing to do with the "distinction" Respondent and the United States attempt to defend. If we assume a hypothetical judge is determined to acquit defendants on nonsensical grounds and shield those acquittals from appellate review, the Michigan "added element" rule will not prevent that judge from doing so. This hypothetical judge would acquit the robbery defendant by *misconstruing* the "placed in

fear" element of robbery so as to require that the victim died. And the hypothetical judge would acquit the defendant charged with burning other real property by *misconstruing* the second element of the offense (that the property burned be a building) so as to require the building be blue or not blue. The United States' hypotheticals therefore serve only to further prove that there is no real distinction between misconstruing elements of an offense so as to increase the prosecution's burden and adding elements to an offense so as to increase the prosecution's burden.[2]

The United States further complains, relying on *Lee v. United States*, 432 U.S. 23 (1977), that Petitioner should have moved for a pretrial determination of the facts necessary to establish the offense with which he was charged. Brief of United States 22-23. Therefore, the United States reasons, his midtrial directed verdict motion should not result in a double jeopardy bar. *Id.* at 23.

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[2] The United States' hypotheticals are just that. Neither Respondent nor the United States has provided any evidence, anecdotal or otherwise, that the nation suffers from an epidemic of devious or incompetent judges granting directed verdicts to defendants because the prosecution failed to prove facts completely irrelevant to the charged offenses. Petitioner's case is certainly not such a case; the trial judge here relied on the official commentary to the standard jury instruction which clearly stated that the prosecution was required to prove that the building burned was not a dwelling house. That commentary was not corrected until seven months after Petitioner's trial.

Lee is inapposite for many reasons, the most fundamental of which was that Lee's motion to dismiss was granted because the information was defective, not because the trial court found evidence of his guilt lacking. As the Court put it, "The dismissal clearly was not predicated on any judgment that Lee could never be prosecuted for or convicted of the theft of the two wallets. To the contrary, the District Court stressed that the only obstacle to a conviction was that the fact that the information had been drawn improperly." 432 U.S. at 30. If *Lee* actually stood for the proposition that a defendant cannot make a midtrial directed verdict motion based on a disputed interpretation of a statute and then rely on the double jeopardy bar to prevent review of a favorable ruling, it would be impossible to explain many of this Court's decisions, including *Smalis* and *Smith*.[3]

If a State is concerned that a judge might erroneously grant a directed verdict based on a misunderstanding of a statute, that State can "craft procedural rules that allow trial judges 'the maximum opportunity to consider with care a pending acquittal motion,' including the option of deferring consideration until after the verdict." *Smith*, 543 U.S. at 474 (quoting

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[3] *Lee* is also inapposite as Petitioner had no way of knowing before trial that the prosecution's proofs would establish that the burned building was actually a dwelling house. In *Lee*, by contrast, the defective information was drafted long before trial but Lee's counsel waited until after the prosecution's opening statement to raise the matter. 432 U.S. at 25.

Martin Linen, 430 U.S. at 574). Or the State can simply prohibit judges from granting directed verdicts in the middle of a trial. *See id.* ("At least one State has altogether precluded midtrial acquittals by the court. *See* Nev. Rev. Stat. Ann. § 175.381(1) (2001)").

The point is simple. Nothing requires a State to grant its judges the power to acquit midtrial. But if a State does choose to authorize its judges to grant midtrial acquittals, it must accept that "the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." *Smith*, 543 U.S. at 467. And this Court's precedents teach that such reexamination is forbidden even for "a preverdict acquittal that is patently wrong in law." *Id.* at 473.

If a State chooses to vest acquittal power in its judges (or any other state actor), the Double Jeopardy Clause allocates the risk of an acquittal based on legal or factual error to that State, not to the citizen the State has hauled into its courts. Since Michigan grants its judges the power to acquit midtrial, *see* Mich. Ct. R. 6.419(A), it must accept the risk that some of those acquittals might be erroneous.

The trial judge here acquitted Petitioner when she evaluated the prosecution's evidence and "determined that it was legally insufficient to sustain a conviction." *Martin Linen*, 430 U.S. at 572. It is in no way Petitioner's fault that the commentary to the standard Michigan jury instructions in use at the

time of Petitioner's trial stated that the prosecution must prove that the building burned was not a dwelling house, and it is in no way Petitioner's fault that the trial judge relied on that commentary.

Having authorized its judges to grant midtrial directed verdict motions, Michigan must accept that such an acquittal is final even if it turned out to be legally erroneous. And it does not matter whether that error is labeled as an erroneous construction of an established element of the crime or as an erroneous addition of an element to the crime.

II. This Court Should Decline the Invitation to Revisit More Than a Century of Precedent Holding Acquittals Unreviewable If Reversal Would Require Further Trial Proceedings.

Perhaps recognizing the difficulty in defending the "distinction" the Michigan Supreme Court drew in this case, Respondent devotes nearly half of its argument to a wide-ranging attack on this Court's Double Jeopardy Clause precedents. Respondent's Brief 34-56. Petitioner is not certain how many of its cases Respondents would have the Court overrule, but the number appears to be large. In particular, Respondent appears to urge the Court to adopt Justice Holmes' dissent from *Kepner v. United States*, 195 U.S. 100 (1904), Respondent's Brief 35-37, a step that would require this Court to abandon or at least reformulate every Double Jeopardy Clause acquittal

case decided over the past century. Somewhat more modestly, the United States urges the Court to reconsider *Martin Linen* and the decisions flowing from it (including, of course, *Rumsey*, *Smalis*, and *Smith*), if those cases require reversal here. Brief of United States 27-32. Both Respondent and the United States thus invite the Court to hold that midtrial acquittals are generally reviewable.

The United States acknowledges that it made precisely such an invitation in *Smalis*, and the Court firmly and unanimously declined it: "Our past decisions, which we are not inclined to reconsider at this time, hold that [a midtrial ruling that the evidence is insufficient to convict] is an acquittal under the Double Jeopardy Clause." *Smalis*, 476 U.S. at 144 (citing *Martin Linen* and *Sanabria v. United States*, 437 U.S. 54 (1978)).

The Court should decline the invitation again.[4] Principles of *stare decisis*, of course, weigh heavily

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[4] This Court could, in its discretion, simply decline to entertain the invitation to radically rewrite its Double Jeopardy Clause jurisprudence because that invitation was not fairly presented in the Brief in Opposition to the Petition. Respondent devoted one paragraph of its Brief in Opposition to the proposition that "Respondent would urge that *Martin Linen* itself goes too far, and that to call a modern directed verdict an 'acquittal' for jeopardy purposes is not compelled either by the text or history of the jeopardy clause." Brief in Opposition 15. In that paragraph, Respondent never explicitly urged this Court to overrule *Martin Linen*, much less adopt the dissent from *Kepner*. *See, e.g., Granite Rock Co. v. Int'l Broth. of Teamsters*, ___ U.S. ___, 130 S. Ct. 2847, 2861 (2010) ("Local did not raise this

(Continued on following page)

against a reconsideration of such well-established precedent. This is especially true given the failure of Respondent and the United States to demonstrate that the challenged precedents have created any systemic problems justifying the extraordinary step of revisiting so many cases that have stood so long. But beyond that, the entire argument is based on a demonstrably false premise.

That premise is that the Double Jeopardy Clause of the Fifth Amendment is nothing more than a codification of English common law principles. Thus, Respondent devotes considerable space to establishing that: (1) directed verdicts as we know them today were unknown at the time of the Framing; and (2) the common law sometimes permitted second prosecutions following acquittals infected by legal error.

As for the first proposition, it is true that the modern directed verdict developed well after the Fifth Amendment was ratified. But that tells us nothing about how the courts of the time would have treated a midtrial directed verdict by a judge if a particular jurisdiction had authorized it. As discussed above, this Court has concluded that if a State chooses to extend the acquittal power to a judge, it must accept

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argument in the Court of Appeals. Nor, more importantly, did Local's brief in opposition to Granite Rock's petition for certiorari raise the argument as an alternative ground on which this Court could or should affirm the Court of Appeal's judgment. . . . Accordingly, the argument is properly 'deemed waived.'") (citation omitted).

the constitutional consequences of that decision, that is, if juries can acquit for erroneous reasons without appellate review, so can judges. *See Smith*, 543 U.S. at 474 (describing steps prosecutors and states may take to protect themselves against "ill-considered acquittal rulings").

The Court made this point clear more than a century ago in *Kepner*:

> Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offense, *it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit*.

195 U.S. at 128 (emphasis added). This conclusion is entirely faithful to the text of the Double Jeopardy Clause, which protects against post-acquittal proceedings without regard to the identity of the actor who rendered the acquittal.

As for the second point and the broader premise underlying it, more than a century ago the Court recognized that the Double Jeopardy Clause is not a mere codification of the common law and that, therefore, the English authorities permitting retrials

following some acquittals are not binding here. In *Ball v. United States*, 163 U.S. 662 (1896), the Court repeatedly made it clear that it was not bound by the common law in interpreting the Double Jeopardy Clause. The Court observed that, "In England an acquittal upon an indictment so defective that if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal." *Id.* at 666 (citations omitted). But the Court then squarely rejected that common law precedent:

> After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime[.] . . . The constitution of the United States, in the fifth amendment, declares, "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

Id. at 669. After next observing that the verdict acquitting Ball was received on a Sunday and citing English cases for the significance of this fact, the Court concluded:

> The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without

> putting him twice in jeopardy, and thereby violating the constitution. *However it may be in England*, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.

Id. at 671 (emphasis added; citing *Sanges v. United States*, 144 U.S. 310 (1892)).

Respondent's historical discussion is thus beside the point. This Court has long recognized that the Double Jeopardy Clause, while informed by English common law, is not bound by it.

Neither Respondent nor the United States has given any persuasive reason why this Court should revisit and overrule so many of its venerable precedents. Those precedents have not produced confusion, instability, or systemic problems.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted,

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Dated: October 2012

AMICUS CURIAE BRIEF

No. 11-1327

In the Supreme Court of the United States

LAMAR EVANS, PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars retrial after a trial court enters a midtrial directed verdict of acquittal based entirely on a determination that the government presented insufficient evidence to prove a nonexistent element of the charged offense.

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In the Supreme Court of the United States

No. 11-1327

LAMAR EVANS, PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents a question about when a midtrial directed judgment of acquittal bars further prosecution and appeal under the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The resolution of that question will affect federal criminal cases, because the Double Jeopardy Clause applies to the federal government; Federal Rule of Criminal Procedure 29(a) provides for midtrial judgments of acquittal; and 18 U.S.C. 3731 permits the United States to appeal in criminal cases only when the Double Jeopardy Clause does not prohibit further prosecution.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person "shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. In September 2008, Detroit police officers saw petitioner running away from the side of a burning house while carrying a gasoline can. Pet. App. 3. He was apprehended after a foot chase and told officers that "he had made a mistake and burned down the house." *Ibid.* At the time of the fire, the house was vacant and had no utility services, but someone was in the process of purchasing it and had begun moving his family's belongings into the house. *Id.* at 3-4. An arson investigator from the Detroit Fire Department determined that the fire was arson and that gasoline had been poured in three rooms. *Id.* at 3.

Petitioner was charged with "wilfully or maliciously" burning "any building or other real property" in violation of Section 73 of the Michigan Penal Code, which is punishable by a term of imprisonment of up to ten years. See Mich. Comp. Laws. Ann. § 750.73 (West 2004). That offense is a lesser-included offense of the crime of burning a dwelling house, which is punishable by a term of imprisonment of up to 20 years. See *id.* § 750.72. As the state court of appeals explained in 1975, "[t]he necessary elements to prove either offense are the same, except to prove the greater it must be shown that the building is a dwelling; to prove the lesser it is not necessary to prove that the building is not a dwelling." *People* v. *Antonelli*, 238 N.W.2d 551, 552 (Mich. Ct. App.).

2. In February 2009, petitioner's case was tried before a jury. Pet. App. 63. At the close of the prosecution's case, petitioner moved for a directed verdict of acquittal. *Id.* at 4, 64.

Petitioner's motion was based on one proposition: that the evidence indicated that the building in question was "a house" and that the prosecution had therefore

failed to prove "the fourth element of the offense." Pet. App. 63-67. In petitioner's view, the fourth element was "that the building was not a dwelling house." *Id.* at 63, 67. In support of that view, he relied on the bracketed fifth paragraph in a model jury instruction for the offense. *Id.* at 67-68.

In response, the prosecutor contended that the statute does not "require[] that this be a dwelling or not a dwelling" and that it "is not necessary to read to the jury" the fifth paragraph of the instruction with "this fourth element, as counsel is terming it." Pet. App. 68. The prosecutor offered to "pull the statute if the Court wants." *Ibid.*

The trial court stated that it did not "have an option of not reading all of the required elements in a jury instruction." Pet. App. 68. Reviewing the instruction and its commentary, the court recited that "an essential element is that the structure burned is not * * * 'a dwelling house.'" *Id.* at 69. The court concluded that the charged offense "specifically says it cannot be a dwelling." *Ibid.*

The prosecutor again asked for "a moment to go upstairs and pull the statute and make sure that the statute addressed that. Because my understanding of the law is that it doesn't matter whether it's a dwelling or not, it just has to be a structure." Pet. App. 69. After reading the statute, the trial court concluded that "a dwelling house, either occupied or unoccupied, is excluded by law." *Id.* at 70. The prosecutor requested "a moment to go upstairs and consult with my supervisors." *Ibid.* The court said: "You can consult with them when you tell them I've granted the motion. * * * As a matter of law." *Id.* at 70-71. The court entered a written

order, dated the same day, stating that "the Motion for Directed verdict of Acquittal" was granted. *Id.* at 72.

3. The State appealed. On appeal, petitioner conceded that the trial court had been "technically incorrect" in granting his motion. Pet. App. 52 n.2. As the court of appeals explained, the bracketed fifth paragraph of the jury instruction—which had been the foundation of petitioner's motion and of the trial court's ruling—was applicable "only when the offense of burning other real property is considered as a lesser included offense of the crime of burning a dwelling," but that had not been the case here. *Id.* at 52. Thus, the trial court "incorrectly determined that proof that the burned building was not a dwelling is an element of the charged offense and directed a verdict of acquittal on the ground that the prosecution had failed to present evidence of that nonelement." *Id.* at 53.

Petitioner nevertheless contended that "the trial court's order granting a directed verdict, though erroneous, constituted an acquittal for double jeopardy purposes, barring a retrial." Pet. App. 53. The court of appeals rejected that contention, concluding that the trial court's decision was not an "acquittal" in the relevant sense because it "never addressed any of the *actual* elements of burning other real property when granting the directed verdict, instead basing the directed verdict entirely on a determination that the prosecution had failed to establish a nonelement." *Id.* at 60-61.

4. Petitioner received leave to appeal from the state supreme court, which affirmed and remanded for further proceedings. Pet. App. 1-44.[1]

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[1] Because the remand contemplates a trial that petitioner contends would violate the constitutional guarantee against double jeopardy,

a. The state supreme court based its constitutional analysis on the definition of "acquittal" in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977): a "ruling of the judge, whatever its label, [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." See Pet. App. 12. The court observed that "an acquittal can occur in some circumstances when the trial court errs," but it concluded that this Court has "not directly considered * * * whether a trial court's acquittal on a criminal charge based on insufficient evidence bars retrial if the trial court erroneously added an extraneous element to the charge." *Id.* at 13.

In concluding that no precedent from this Court controlled, the state court distinguished three decisions on the ground that they "involve[d] evidentiary errors regarding the proof needed to establish a factual element"—or "how to prove" an element of the offense—rather than whether a particular element was part of the offense. Pet. App. 16 (discussing *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986), and *Smith* v. *Massachusetts*, 543 U.S. 462 (2005)). The court acknowledged that the "acquittals" in those cases were "based on the prosecution's failure to prove something that the law did not actually require it to prove," but it stressed the "key distinction" between the erroneous resolution of "one of the factual elements charged" and the trial court's decision in this case to "add[] an element and then f[ind] it unsupported by evidence in the record." *Id.* at 17 n.39.

The state supreme court explained that the trial court had "undisputedly misapprehended" the jury in-

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the state court's decision is final for purposes of 28 U.S.C. 1257(a). See *Smalis* v. *Pennsylvania*, 476 U.S. 140, 143 n.4 (1986).

struction and incorrectly "added an extraneous element to the charged offense." Pet. App. 21, 23. The trial court therefore "did not resolve or even address any factual element necessary to establish a conviction for" the offense that had actually been charged, "burning other real property." *Id.* at 24. Accordingly, its decision was "unrelated to [petitioner's] guilt or innocence on the elements of the charged offense" and "did not involve a resolution of any of the factual elements of the charged offense." *Id.* at 24-25, 26-27. The directed verdict thus did not satisfy *Martin Linen*'s "definition of acquittal for the purposes of double jeopardy." *Id.* at 27.

b. Three justices dissented. Justice Cavanagh (joined by Justice Kelly) focused on decisions from this Court emphasizing that acquittals are "final," "absolute," and "may not be reviewed" even when they are "based on an incorrect foundation," are "egregiously erroneous," or the result of "erroneous evidentiary rulings *or* erroneous interpretations of governing legal principles." *Id.* at 32-35 (internal quotation marks omitted). He believed the majority had "elevate[d] form over substance" by "creating a distinction between improperly adding an element to an offense and misconstruing an actual element of a statute." *Id.* at 38. In a separate dissent, Justice Hathaway "disagree[d] with the distinction that the majority dr[ew] between a trial court's erroneous ruling related to a required element of an offense and a trial court's erroneous ruling related to a mistakenly added element of an offense." *Id.* at 44.

SUMMARY OF ARGUMENT

A trial court's midtrial determination as a matter of law that the government has failed to present sufficient evidence of a nonexistent element of the charged offense is not an acquittal for double-jeopardy purposes.

A. In the double-jeopardy context, this Court has consistently defined an "acquittal" as a decision that "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). That definition's focus on the elements of the offense is consistent with the constitutional text, which requires that a defendant have been placed in jeopardy for a particular "offence." U.S. Const. Amend. V. A criminal offense is defined by its elements, and an acquittal requires a determination that the defendant is not guilty of at least one element of the charged offense (or has established an affirmative defense that negates culpability).

B. Here, the trial court's decision to grant judgment as a matter of law rested entirely on its determination that the prosecution had failed to provide sufficient evidence to satisfy a *nonexistent* element of the charged offense. Because that decision was not based on petitioner's guilt or innocence on the elements of the charged offense, it was not an acquittal. The post-*Martin Linen* decisions that petitioner invokes are distinguishable, because they involved disputes about whether evidence would suffice to establish an actual element of an offense, not decisions pertaining to a spurious element.

C. Double-jeopardy protections balance the defendant's interests against the public's interest "in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). Petitioner's midtrial motion for judgment as a matter of law could just as well have been resolved before trial and before jeopardy attached. Permitting the State to appeal the resulting de-

cision—which, at petitioner's behest, kept the factfinder from making any decision about guilt or innocence—would be consistent with this Court's decisions involving other defense motions to terminate proceedings. See, *e.g.*, *Lee* v. *United States*, 432 U.S. 23, 28 (1977). Otherwise, defendants would have an incentive to raise legal questions at the least opportune time, increasing the likelihood of judicial errors (and insulating them from review).

D. If the Court declines to draw a distinction between evidentiary-insufficiency determinations that depend on nonexistent elements and those that do not, it should accept respondent's invitation to reconsider those aspects of its prior cases that have equated court-decreed acquittals on the basis of insufficient evidence with true acquittals (by juries or judges) that rest on factual findings. The only reason the Court has ever given in support of that equivalence is that the appealability of an acquittal as a matter of law should not depend on its timing. But that premise has been vitiated by this Court's subsequent double-jeopardy cases, which permit appeal of postverdict judgments of acquittal. And no historical basis justifies equating midtrial acquittals with jury verdicts for double-jeopardy purposes. The very premise for granting an acquittal as a matter of law without allowing the case to go to the jury would have been irreconcilable with the Founding-era understanding that the jury itself had the right to judge the law.

ARGUMENT

A MIDTRIAL DETERMINATION AS A MATTER OF LAW THAT THE GOVERNMENT HAS FAILED TO PRESENT SUFFICIENT EVIDENCE ABOUT A NONEXISTENT ELEMENT OF A CHARGED OFFENSE IS NOT AN ACQUITTAL FOR DOUBLE-JEOPARDY PURPOSES

A. For Double-Jeopardy Purposes, An "Acquittal" Must Reflect A Resolution Of At Least One Factual Element Of The Charged Offense

Consistent with the common-law plea of *autrefois acquit*, a principal purpose of the Double Jeopardy Clause is to ensure that "once a person has been acquitted of an offense he cannot be prosecuted again on the same charge." *Green* v. *United States*, 355 U.S. 184, 192 (1957); see *United States* v. *Ball*, 163 U.S. 662, 671 (1896) ("[I]n this country a verdict of acquittal * * * is a bar to a subsequent prosecution for the same offence.").[2] In recent decades, the Court has maintained that that constitutional protection applies to "a court-decreed acquittal to the same extent" that it does to "an acquittal by jury verdict." *Smith* v. *Massachusetts*, 543 U.S. 462, 467 (2005) (citing cases). That does not, however, obviate the need to determine in the first instance whether a judge's decision as a matter of law is actually an acquittal.

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[2] Blackstone described the plea of *autrefois acquit*, "or a former acquittal," as being "grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence." 4 William Blackstone, *Commentaries on the Laws of England* 329 (1769). As a result, "when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime." *Ibid.*

1. The Court's cases about "acquittals" have focused on whether elements of the offense have been resolved

The Court has acknowledged that "[t]he word ['acquittal'] has no talismanic quality for purposes of the Double Jeopardy Clause," and whether a particular action constitutes an "acquittal" is therefore a question that "cannot be divorced from the procedural context in which the action so characterized was taken." *Serfass* v. *United States*, 420 U.S. 377, 392 (1975) (citation omitted); see Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 137-138 (1979) ("For purposes of double jeopardy, an acquittal is a conclusory term used to describe rulings possessing the quality of finality.").

When evaluating whether a decision constitutes an acquittal for double-jeopardy purposes, the Court has repeatedly applied the definition it articulated in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), which asks whether the "ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571. In 2005, the Court applied that definition and accurately described it as "the definition of acquittal that our double-jeopardy cases have consistently used." *Smith*, 543 U.S. at 467-468; accord, *e.g.*, *Blueford* v. *Arkansas*, 132 S. Ct. 2044, 2053 (2012) (Sotomayor, J., dissenting) (reciting same definition in describing when "a jury's decision" constitutes "an acquittal"); *Price* v. *Vincent*, 538 U.S. 634, 640 (2003) (finding, in habeas case, that state court "properly followed *Martin Linen*" by applying same definition). In light of that definition, the Court has explained that an appellate court's reversal of a conviction on the grounds that the government had failed to prove the defendant had the

mental capacity to be responsible for criminal acts is an acquittal. *Burks* v. *United States*, 437 U.S. 1, 10 (1978). On the other hand, when a defendant's successful midtrial motion to dismiss on grounds of pre-indictment delay results in a "termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he [was] accused," that decision is not an acquittal. *United States* v. *Scott*, 437 U.S. 82, 97, 98-99 (1978); see also *Lee* v. *United States*, 432 U.S. 23, 30-31 & n.8 (1977) (affirming conviction on retrial after judge granted midtrial motion to dismiss indictment as insufficient during earlier trial).

In such cases, the Court has focused on the distinction between a finding that pertains to guilt or innocence (and thus to the elements of the offense or a culpability-negating defense) and a finding that rests on some other legal ground that does not establish factual guilt or innocence.[3] In *Burks*, for instance, the Court distinguished between reversals for trial error, which "impl[y] nothing with respect to the guilt or innocence of the defendant," and reversals for evidentiary insufficiency. 437 U.S. at 15.

2. Focusing on elements of the offense is consistent with the text of the Double Jeopardy Clause

The focus in *Martin Linen*'s definition of acquittal on "the factual elements of the offense charged" (430 U.S. at 571) is consistent with the text of the Double Jeopardy Clause, which requires that a defendant have been

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[3] Culpability for an offense can be negated by proof of an affirmative defense like duress, insanity, or self-defense, and a verdict for the defendant on those grounds also counts as an acquittal for double-jeopardy purposes. See *Burks*, 437 U.S. at 10-11 (insanity defense). As used in this brief, the "elements" of an offense encompass legally recognized defenses that would negate culpability.

placed in jeopardy for a particular "offence." U.S. Const. Amend. V. As a result, "[d]ouble-jeopardy analysis focuses on the individual 'offence' charged." *Smith*, 543 U.S. at 469 n.3.

The Constitution's reference to an "offence" has been interpreted to focus on the elements of that offense, because a criminal offense is defined by its elements. That is true for purposes of the Due Process Clause and the Sixth Amendment right to a jury trial, with respect to which the Court has explained that, in order to "return a verdict of guilty," the "factfinder" must be persuaded beyond a reasonable doubt of the facts necessary to establish "all elements of the offense charged." *Sullivan* v. *Louisiana*, 508 U.S. 275, 277-278 (1993). It is also true in the context of the Double Jeopardy Clause, where the determination of whether two offenses are the same is governed by a comparison of their "elements," not other facts related to the underlying conduct. *United States* v. *Dixon*, 509 U.S. 688, 704-709 (1993).

After *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), an "element" of an offense for constitutional purposes is properly understood as encompassing those matters defined by the legislature as elements and any fact (other than a prior conviction) that justifies "an increase beyond the maximum authorized statutory sentence"; such a fact, even if labeled a sentencing factor, "is the functional equivalent of an element of a greater offense" and triggers the same constitutional protections. *Id.* at 494 n.19; see *Ring* v. *Arizona*, 536 U.S. 584, 605 (2002) (Sixth Amendment jury-trial right); *United States* v. *Cotton*, 535 U.S. 625, 627 (2002) (Fifth Amendment indictment right); *Apprendi*, 530 U.S. at 476 (jury trial and proof beyond a reasonable doubt); see also *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality

opinion) (finding "no principled reason" to distinguish an "offense" for double-jeopardy purposes from an "offense" for purposes of the jury-trial right).

A "criminal conviction[]" is required "to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). By the same logic, an *acquittal* sensibly depends on a determination that the defendant is not guilty of at least one element of the charged offense.

B. A Decision About A Nonexistent Element Is Not An "Acquittal" Because It Does Not Speak To The Defendant's Guilt Or Innocence Of The Charged Offense

In this case, the trial court's decision to grant judgment as a matter of law in favor of petitioner indisputably rested on a single consideration: that the prosecution had failed to provide sufficient evidence to satisfy a *nonexistent* element of the charged offense (*i.e.*, that the burned building was not a dwelling). See pp. 3-4, *supra*. Although petitioner's oral motion for a directed verdict was based on the premise that non-dwelling status was "the fourth element" of the charged offense (Pet. App. 63, 67), he no longer contends that non-dwelling status was an element. And the state appellate courts made abundantly clear that non-dwelling status was not—and never had been—an element of the offense as it was charged in this case. *Id.* at 21-23, 51-53. In those circumstances, the state supreme court properly invoked *Martin Linen*'s definition of an acquittal and concluded that "the trial court's decision was based on an error of law unrelated to [petitioner's] guilt or innocence on the elements of the charged offense, and thus * * * did not constitute an acquittal." *Id.* at 24-25.

1. The Court has not retreated from the elements focus of Martin Linen

In response, petitioner contends (Br. 12-16) that this Court has distanced itself from an elements-based definition by focusing more generally on whether the trial court, however erroneously, believed it was determining whether the prosecution had proved guilt or innocence.

The Court has indeed repeatedly stressed that a judge's acquittal as a matter of law does not cease to be an acquittal simply because it is based on legal error—even when that error is "patent[]" (*Smith*, 543 U.S. at 473) or "egregious[]" (*Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962)). But when a court erroneously "label[s]" its decision an acquittal (or non-acquittal), this Court still looks to the decision's substance to determine what it is—and the answer to that question turns on whether the decision resolves "some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. The court's resolution need not be legally "correct" (*ibid.*), but it does need to resolve at least one element of the offense—as opposed to extraneous facts that do not pertain to culpability for the offense. Otherwise, the ruling would have no tether to the constitutional text, which requires the ruling to be about the "offence" in order to implicate the Double Jeopardy Clause.

Petitioner contends that the Court's decision in *Scott* clarified *Martin Linen*'s definition of acquittal by explaining that a non-acquittal is a decision that is "unrelated to the defendant's guilt or innocence." Pet. Br. 12-13 (emphasis omitted); see Resp. Br. 14-17 (noting that petitioner finds it necessary to modify *Martin Linen*'s test). To that end, petitioner quotes (Br. 13) *Scott*'s statement that a defendant who has been released for reasons that "are unrelated to factual guilt or innocence,

has not been determined to be innocent in any sense of that word." 437 U.S. at 98 n.11. Yet, when a purported acquittal rests entirely on a ground that is not an element of the offense, it is equally true that the defendant has not been found to be "innocent" in any sense of the word, because the only determination that has been made is immaterial to resolving guilt on the crime charged. It is therefore unsurprising that the Court has continued to quote *Martin Linen*'s reference to "factual elements" without indicating that *Scott* prescribes a different inquiry unbounded by the elements of the charged offense. See, *e.g.*, *Smith*, 543 U.S. at 468.

Accordingly, petitioner errs in concluding (Br. 15) that the trial court's "ruling, correct or not, was entirely about [p]etitioner's innocence of the charged offense." That is simply not true, and cannot be true, because "innocence of the charged offense" cannot turn on something that is concededly not an element of the offense. If, for example, a defendant who was charged with robbery moved for a midtrial judgment of acquittal on the ground that the government had presented no evidence that anyone had died in the course of the crime, the court's granting of that motion could perhaps be seen as an acquittal—that is, a resolution on the facts—of a homicide or felony-murder charge, but it could not "represent[] a resolution * * * of some or all of the factual elements of the" charged offense of robbery. *Martin Linen*, 430 U.S. at 571. Or, to use the offense in this case, the trial court's decision that the building at issue was not a dwelling had no more to do with petitioner's guilt or innocence than would a decision about whether the building happened to be blue. See Resp. Br. 16-17.

2. The state supreme court correctly distinguished this Court's previous cases

Petitioner contends that three of this Court's decisions are inconsistent with the state supreme court's focus on the nonelement predicate of the trial court's judgment. Br. 16-19, 23-25 (discussing *Smith*, *supra*; *Smalis* v. *Pennsylvania*, 476 U.S. 140 (1986); and *Arizona* v. *Rumsey*, 467 U.S. 203 (1984)). But those cases are readily distinguishable, because they involved garden-variety disputes about whether evidence would suffice to establish an actual element of an offense, not decisions pertaining to a spurious element.

a. *Smith* involved a jury trial on three counts, including a firearms charge. 543 U.S. at 464. An undisputed "element" of the firearms charge was that the weapon "had a barrel less than 16 inches in length." *Ibid.* (internal quotation marks omitted). At the close of the prosecution's case, the defendant moved for a judgment of acquittal on that charge, arguing that evidence that the weapon was a "pistol" was insufficient to satisfy that element. *Id.* at 465. The court granted the motion, and the defense proceeded with its case on the remaining charges. *Ibid.* Before closing arguments, the prosecutor informed the court about precedent holding that testimony that a weapon is a "pistol" could prove the barrel-length element, and the court "reversed" its previous ruling and submitted the firearms charge to the jury, which convicted on all three counts. *Id.* at 465-466.

This Court held that, in the absence of a previously established rule or precedent permitting the trial court to reconsider its midtrial judgment of acquittal, the defendant was entitled to rely on the court's "facially unqualified" dismissal of that charge when deciding whether and how to present his defense on the other charges.

Smith, 543 U.S. at 473. The Court also concluded that, although legally incorrect, the trial court's ruling was an acquittal, because—like a federal court's ruling under Federal Rule of Criminal Procedure 29—it "resolve[d] elements of the offense" on the basis of the judge's evaluation of the prosecution's evidence. *Smith*, 543 U.S at 468, 469.

In discussing *Smith*, petitioner focuses (Br. 18, 25) on the Court's statements that legal error does not prevent a decision from being an acquittal. But that misses the point: The Court found that there had been an acquittal because the trial court's decision resolved an "element[] of the offense." 543 U.S. at 468. *Smith* gave no indication that the decision would still have been an unreviewable acquittal even if it had had nothing to do with the offense elements (and thus nothing to do with the actual firearms charge).[4]

b. In *Smalis*, the defendants opted for a bench trial on various charges relating to the burning of a building that resulted in two deaths. 476 U.S. at 141. At the close of the prosecution's case, they moved for a "demurrer" based on the insufficiency of the evidence, which the trial court granted, on the ground that the evidence failed to "link the defendants to the cause of the fire." Pet. App. at 108a, *Smalis*, *supra* (No. 85-227) (discussing murder and manslaughter counts); see *id.* at 110a (similar finding about lack of evidence that "the defendants were the person or persons responsible for the fire" for purposes of catastrophe counts). On appeal, the

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[4] To the extent *Smith* was driven by the Court's concern that a "false assurance of acquittal on one count" had affected the defendant's trial strategy with respect to remaining counts, 543 U.S. at 472, no such prejudice occurred here, because the trial court's judgment terminated all proceedings before petitioner could present his case.

Pennsylvania Supreme Court determined that the demurrer was not an acquittal, because "by definition, a demurrer is not a factual determination" but "purely one of law." 476 U.S. at 143.

This Court reversed, rejecting the contention that a purely legal decision could not constitute an acquittal. *Smalis*, 476 U.S. at 144. In a three-sentence discussion, it held that, under its previous cases, including *Martin Linen*, a ruling "as a matter of law [that] the State's evidence is insufficient to establish [the defendant's] factual guilt" is an acquittal. *Id.* at 144 & n.6. In a footnote, the Court observed that that conclusion was "not affected by the Commonwealth's allegation that the [trial] court 'erred in deciding what degree of recklessness'" was necessary for one count, because that would not have altered the essential character of the acquittal. *Id.* at 144 n.7.

Nothing in *Smalis*, however, involved adding a nonexistent element to the offense. At most, the Court was willing to regard as immaterial an arguable misunderstanding of a conceded mental-state element. That error (if it occurred at all) did not convert the trial court's decision from a typical sufficiency-of-the-evidence decision—like the ones that had been at issue in the cases the Court cited (including *Martin Linen* and *Burks*), 476 U.S. at 144 & n.6—into nonexistent-element legal error. Nor did the trial court's opinion about its demurrer appear to add an extra element to any of the charged offenses. Instead, it simply found insufficient evidence that the defendants had played any role in causing the fire at issue. See p. 17, *supra*. Accordingly, *Smalis* is inapposite.

c. *Rumsey* dealt with the sentencing phase of a capital case.[5] To impose the death penalty, the State had to prove at least one statutory aggravating circumstance beyond a reasonable doubt. See 467 U.S. at 210. The State contended that Rumsey's crime involved the aggravating circumstance of being committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." *Id.* at 205 (internal quotation marks omitted). At sentencing, the trial court entered a sentence of life imprisonment and explained that the pecuniary-value aggravating factor had not been satisfied by evidence that the murder occurred in the course of a robbery, because that factor was meant "to apply to a contract-type killing situation." *Id.* at 206 (internal quotation marks omitted). On appeal, the state supreme court reversed the trial court's interpretation of the statutory aggravating factor, explaining that "theft committed in the course of a murder could constitute an aggravating circumstance." *Id.* at 207 (internal quotation marks omitted). On remand, the sentencing court found that the aggravating factor had been established and imposed a death sentence, which the state supreme court then set aside on double-jeopardy grounds. *Id.* at 208-209.

This Court affirmed, holding that the trial court's initial sentencing decision constituted "an acquittal on the

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[5] The Court had previously held that double-jeopardy protections attached to death-penalty-phase proceedings before a jury. See *Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981). *Rumsey* extended that holding to Arizona's capital-sentencing scheme, "in which the judge, as opposed to a jury," determined the sentence. *Monge* v. *California*, 524 U.S. 721, 731 (1998). As the Court later recognized, the reasoning of those cases was specific to "the capital sentencing context," which "is in many respects a continuation of the trial on guilt or innocence of capital murder." *Id.* at 731-732.

merits" that barred retrial because it was "based on findings sufficient to establish legal entitlement to the life sentence," and because it addressed "the merits of the central issue in the proceeding—whether death was the appropriate punishment." *Rumsey*, 467 U.S. at 211. The Court acknowledged that the trial court had "relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance," but it explained that "an error of law" does not alter the double-jeopardy effects of "a judgment that amounts to an acquittal on the merits." *Ibid.*

Rumsey did not indicate that it was altering the definition of acquittal—except to encompass the death-penalty-sentencing-phase equivalent of an element: "detailed statutory standards defining aggravating and mitigating circumstances," 467 U.S. at 210; cf. *Sattazahn*, 537 U.S. at 111 (plurality opinion).[6] Petitioner contends (Br. 24) that the trial court's error in *Rumsey* could "easily be regarded as adding an extra element—that the defendant committed the killing pursuant to a contract." But no party or court in the case ever disputed that, under the circumstances, the statute required the State to prove beyond a reasonable doubt that the murder was committed for pecuniary gain. In other words, the court's legal error was not about the existence *vel non* of an "element" of the crime of capital murder. In-

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[6] *Rumsey* also referred to the relevant decision as "an acquittal on the merits by *the sole decisionmaker* in the proceeding," 467 U.S. at 211 (emphasis added), raising some question about whether it applies to a context like this case, where the judge took the decision away from the jury by granting judgment as a matter of law. One treatise suggested that *Rumsey* "in the end, sheds little light," because it seems to be "a reflection of the many special protections imposed on death sentence procedures." 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3919.5, at 662-663 (2d ed. 1992).

stead, as in *Smith* and *Smalis*, it was about what evidence would suffice to prove that the defendant had in fact killed for pecuniary gain.

d. Petitioner's amicus (NACDL Br. 4) contends that respondent cannot prevail unless the Court overrules its decision in *Sanabria* v. *United States*, 437 U.S. 54 (1978), which purportedly involved a trial court's error about a "distinct element" of an offense. But even amicus admits (Br. 10-11) that no "distinct element" argument was "presented to," or "expressly" addressed by, the Court. In fact, *Sanabria* stated that the petitioner there "was found not guilty for a failure of proof on a key 'factual element of the offense charged.'" 437 U.S. at 71. It also observed that "the [d]istrict [c]ourt did not find that the [relevant] count failed to charge a necessary element of the offense," but instead "found the indictment's description of the offense too narrow to warrant the admission of certain evidence." *Id.* at 68. The Court thus "characterized" the decision "as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence." *Id.* at 68-69 (footnote omitted). That holding is not inconsistent with the reasoning of the state supreme court here that a judge's legal ruling that the State failed to prove a nonexistent element is not an acquittal for double-jeopardy purposes.

C. Allowing A Legal Decision Predicated On A Nonexistent Element To Be Appealed Is Consistent With The Purposes Of Double Jeopardy

When defining the contours of double-jeopardy protections, this Court has balanced the interests of defendants "against the public interest in insuring that justice is meted out to offenders." *Scott*, 437 U.S. at 92; see *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). The public has an important interest "in affording the prose-

cutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978); accord *Sattazahn*, 537 U.S. at 114-115.

1. Other judgments on matters of law that could have been raised before jeopardy attached are already appealable

Petitioner sought judgment as a matter of law in the middle of trial based on an erroneous legal contention (*i.e.*, that non-dwelling status was an element of the charged offense). That claim could just as well have been resolved before trial and before jeopardy attached. Permitting the State to appeal the decision here—which, at petitioner's behest, kept the factfinder from making any decision about guilt or innocence—would be consistent with this Court's decisions involving other defense motions to terminate proceedings.

a. In *Lee* v. *United States*, 432 U.S. 23 (1977), the information inadvertently omitted the knowledge and intent elements of the charged offense, and the defendant moved to dismiss the information after the government's opening statement in a bench trial. *Id.* at 25. At the end of the trial, the judge, without announcing a verdict, granted the motion to dismiss. *Id.* at 26-27. On retrial based on an indictment alleging all of the elements, the defendant was convicted, and this Court rejected a double-jeopardy challenge. *Id.* at 27, 34. The Court held that the dismissal was "functionally indistinguishable from a declaration of mistrial" and that, therefore, the proceedings had not "terminated in [defendant's] favor," as would be required for there to be an acquittal. *Id.* at 30, 31; cf. *United States* v. *Dinitz*, 424 U.S. 600, 606-608 (1976) (finding no double-jeopardy bar to retrial after defendant's successful motion for mistrial). *Lee*

emphasized that, by raising the issue so late, the defendant had "invited the court to interrupt the proceedings before formalizing a finding on the merits." 432 U.S. at 28; see also *Serfass*, 420 U.S. at 380, 390, 394 (permitting appeal and remand for trial when lower court dismissed indictment on grounds that petitioner was factually innocent of charged offense; rejecting contention that lower court's determination was the "functional equivalent of an acquittal on the merits" because it rested on facts).

The erroneous addition of an element to a charged offense involves a functionally similar situation. Indeed, identifying the elements of an offense is a necessary step in determining the sufficiency of a charging document. Such a determination can be undertaken before trial. When a defendant waits until the middle of trial to ask the court to determine the elements of the offense—regardless of how that request is phrased—he "invite[s] the court to interrupt the proceedings before formalizing a finding on the merits." *Lee*, 432 U.S. at 28. Moreover, when the resulting decision is based on a nonexistent element of the offense, it does not, as discussed above, establish that the defendant is "innocent in any sense of that word." *Scott*, 437 U.S. at 98 n.11. Therefore, such a midtrial motion, like a motion to dismiss on legal grounds, should not result in a double-jeopardy bar to further proceedings after an appeal.

Here, the State did not allege that the burned structure was "not a dwelling." As in *Lee*, the issue of what the statute required the prosecution to prove could have been brought to the court's attention before jeopardy attached. Having gone to trial and then raised the issue midstream, petitioner cannot now claim that a retrial would "'deprive[]' [him] of his valued right to go to the

first jury." *Scott*, 437 U.S. at 100. Rather, "only the public [will have] been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.'" *Ibid.* (quoting *Arizona* v. *Washington*, 434 U.S. at 509).[7]

b. Petitioner's amicus contends (NACDL Br. 11) that petitioner "should not have to face another determination of guilt or innocence" because "[t]he error was not his" and "he did not avoid the first determination." But petitioner did elicit the trial court's directed verdict of acquittal, and he did so by contending solely that the prosecution had failed to prove that the building was not a dwelling (Pet. App. 63-68)—a fact that petitioner now concedes was irrelevant to petitioner's guilt or innocence of the charged offense. As in *Scott*, "[t]his is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact." 437 U.S. at 96; see Pet. App. 28-29. Nor is it one where the prosecutor is "seeking 'another opportunity to supply evidence which it failed to muster' before jeopardy terminated." *Smith*, 543 U.S. at 473-474 n.7 (quoting *Burks*, 437 U.S. at 11).

c. Treating erroneous midtrial determinations of the elements of an offense as acquittals would give defendants an incentive to raise complicated issues of statutory

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[7] This is not an argument that petitioner waived his double-jeopardy rights, see Pet. Br. 19 n.4, but a recognition that he must live with the "consequences of his voluntary choice." *Scott*, 437 U.S. at 99; see *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) ("there is no violation of the Double Jeopardy Clause when [a defendant] elects to have * * * two offenses tried separately and persuades the trial court to honor his election," even if one offense is a lesser-included offense of the other).

interpretation at the least opportune time, increasing the likelihood of judicial errors (and insulating them from review). Cf. *United States* v. *Appawoo*, 553 F.2d 1242, 1246-1247 (10th Cir. 1977) (district judge's explanation to defense counsel that it would be better for the defendant and the court to postpone ruling on statute's constitutionality, via a judgment of acquittal, until after jeopardy had attached). This Court recognized the injustice associated with such incentives in *Lee* and *Scott*, and it should also do so here.

2. Jurisdictions following the state supreme court's approach have not had difficulties in application

Petitioner contends (Br. 20) that the state supreme court's focus on the nonelement predicate of the trial court's decision is "unworkable in application." But that argument depends on petitioner's apparent belief (Br. 25) that the rationale would allow any evidentiary-insufficiency ruling to be "recast as requiring the prosecution to prove an 'extra element.'" Here, there was no need to recharacterize the trial court's decision in order to conclude that it was premised entirely on the addition of a spurious element. The colloquy about petitioner's motion for judgment addressed nothing but the phantom "fourth element" of non-dwelling status. See pp. 3-4, *supra*.

Moreover, experience belies petitioner's fears. Jurisdictions that have adopted (or at least not rejected) the state supreme court's approach have not been overrun with "prosecutorial appeals after many, if not most, midtrial directed verdict grants." Pet. Br. 21. To the contrary, such jurisdictions have been careful to allow an appeal only when it was clear that the decision in question did in fact turn on a nonexistent element. The Third Circuit allowed an appeal in such a case in 1984.

See *United States* v. *Maker*, 751 F.2d 614, 623-624, cert. denied, 472 U.S. 1017 (1985). But it appears not to have seen another one in the intervening 28 years. The Idaho Supreme Court allowed an appeal in such a case in 2003, see *State* v. *Korsen*, 69 P.3d 126, 136-138, but found that a subsequent case was distinguishable because the trial court there had "required the State to meet an additional, unnecessary" evidentiary requirement "to prove one of the necessary elements of the crime," but it had not "require[d] the State to prove an additional element," *State* v. *Howard*, 248 P.3d 722, 730 (2011). In 1998, the Second Circuit did not question the distinction between mere legal error and a decision based on an "additional, distinct, and severable element." *United States* v. *Lynch*, 162 F.3d 732, 735. It did, however, hold that the district-court decision at issue there reflected an "error of law" about the actual element of willfulness, and not a spurious "fifth element of the offense" of criminal contempt. *Ibid.* Such decisions demonstrate that the state supreme court has not stepped onto a slippery slope.

Nor is there reason to believe, as petitioner suggests (Br. 21, 29), that the state supreme court's rationale poses a threat to decisions that are made by actual juries, which necessarily involve facts rather than decisions made as a matter of law. Juries' verdicts have always received special solicitude, and their acquittals cannot be set aside. See, *e.g.*, *Sparf* v. *United States*, 156 U.S. 51, 105 (1895); *Ball*, 163 U.S. at 671. Although petitioner invokes (Br. 29) this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), as evidence that courts might attempt to determine the foundation of an acquittal, the Court has been careful to avoid "impugn[ing] the legitimacy" of even "logically inconsistent" jury verdicts. *Yeager* v. *United States*, 557 U.S. 110, 125 (2009).

D. If Necessary, The Court Should Reconsider Its Cases Equating Midtrial Judgments Of Acquittal As A Matter Of Law With Verdicts Of Acquittal By Factfinders

As discussed above, this Court may affirm the state supreme court's judgment and rationale simply by declining to extend its previous cases about evidentiary insufficiency on acknowledged elements to the context of a trial-court decision that depends only on a nonexistent element of the charged offense. If, however, the Court believes that *Smith*, *Rumsey*, and *Smalis* do not permit review of a judge's mistaken addition of an element to an offense, that aspect of those cases should be reconsidered. It is simply illogical to find an acquittal when the judge has misconstrued the elements of the offense before finding the evidence to be insufficient. In such a case, no one has determined that, as a factual matter, the prosecution failed to prove its case, because the judgment is based on a legal error that is collateral to the sufficiency of the evidence.

Furthermore, if the Court perceives no distinction, in the context of midtrial judgments of acquittal as a matter of law, between the addition of a nonexistent element and the finding of insufficient evidence, it should accept respondent's invitation (Br. 34-56) to reconsider those aspects of its prior cases that have—without analysis or recourse to historical practice—equated court-decreed acquittals on the basis of insufficient evidence with true acquittals (by juries or judges) that rest on factual findings.[8]

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[8] In *Smalis*, the United States filed an amicus brief urging the Court to reconsider *Martin Linen*, because "a court's legal conclusion that the evidence is insufficient, although labeled an 'acquittal' in Rule 29, is not in constitutional analysis entitled to the special weight accorded to the factfinder's determination of innocence." U.S. Ami-

1. The Court has "never felt constrained" to follow a decision that has proved to be "unworkable," *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991), that has had its underpinnings eroded by later precedent, *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997), or that is not "well reasoned," *Montejo* v. *Louisiana*, 556 U.S. 778, 792-793 (2009). Moreover, the Court's "considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962), or "in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior," *Gaudin*, 515 U.S. at 521.

The Court's double-jeopardy jurisprudence in particular has already provided a rich field for reconsiderations—perhaps because the bulk of its cases came in a relatively brief period after the Court's 1969 decision to apply the Double Jeopardy Clause to the States (*Benton* v. *Maryland*, 395 U.S. 784, overruling *Palko* v. *Connecticut*, 302 U.S. 319 (1937)) and Congress's 1971 amendment to 18 U.S.C. 3731, eliminating nonconstitutional restrictions on federal government appeals in criminal cases.[9]

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cus Br. at 12, 21-25, *Smalis*, *supra* (No. 85-227). Short of that, the United States suggested that the Court should, at a minimum, clarify that there is no "acquittal" when "the court misapprehends the elements of the charged offense" and "holds the evidence insufficient because the prosecution failed to prove a nonexistent element." *Id.* at 25 n.17. The Court's opinion did not address the United States' arguments, except to state that "[o]ur past decisions, which we are not inclined to reconsider at this time, hold that such a ruling is an acquittal." 476 U.S. at 144.

[9] See, *e.g.*, *Dixon*, 509 U.S. at 712 (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)); *Scott*, 437 U.S. at 87 (overruling *United States* v. *Jenkins*, 420 U.S. 358 (1975)); *Burks*, 437 U.S. at 9-10, 18 (overruling an entire line of earlier decisions).

2. Although *Smith* recognized that the Court has, for double-jeopardy purposes, treated "a court-decreed acquittal" no differently than "an acquittal by jury verdict," 543 U.S. at 467 (citing cases), those cases date back only to 1970.[10]

More importantly, when the Court summarily equated a judge's insufficiency ruling with a jury's verdict of acquittal, it gave, as commentators have observed, virtually no reason at all for that treatment. See 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.3(c), at 633 (3d ed. 2007) ("It is unclear exactly what has convinced the Supreme Court to treat all directed acquittals alike, and to treat all as parallel to a jury acquittal."); Westen & Drubel, 1978 Sup. Ct. Rev. at 132 n.237 (noting that the Court has not "seriously addressed" why "the reasons for according jury acquittals non-appealable finality" "should apply to judicial acquittals"); cf. 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3919.5, at 669 (2d ed. 1992) ("For whatever reasons, it is established—at least for the time being—that the government may not appeal if a preverdict judgment of acquittal rests on a trial court assessment of the sufficiency of the evidence, no matter how clearly mistaken the trial court may have been in requiring any proof whatever of the matters involved.").

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[10] *Smith* cites (543 U.S. at 467), and respondent discusses (Br. 50-51), the Court's 1962 per curiam decision in *Fong Foo*, *supra*, which applied the Double Jeopardy Clause, without discussion, to a "judgment of acquittal" that followed a directed verdict. 369 U.S. at 143. But that "acquittal"—which was based in part on prosecutorial misconduct and which occurred near the beginning of the prosecution's case, *id.* at 142—would not qualify as an acquittal after *Scott* and *Martin Linen*.

The only reason articulated in any of the cases cited in *Smith* was that a *mid*trial acquittal should not be treated differently from a "post-verdict directed acquittal," *United States* v. *Sisson*, 399 U.S. 267, 290 (1970), because that would make "the constitutional significance of a Rule 29 judgment of acquittal [turn] on a matter of timing," *Martin Linen*, 430 U.S. at 574.

Whether or not that premise was well founded in 1970, it has been vitiated by the Court's recognition that the government may in fact "appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact." *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980). Indeed, the midtrial acquittal, however mistaken, has become an isolated bastion of unreviewability, in contrast to pretrial judicial mistakes, posttrial judicial mistakes, midtrial dismissals caused by prosecutorial mistakes in drafting the indictment, and procedural mistakes during trial that are not acquittals. See *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 839 (7th Cir. 1985) (citing cases). In that light, "[i]t is hard to understand the special finality given to such mid-trial blunders." *Ibid.* Double-jeopardy law would be more consistent and coherent if such midtrial acquittals were also reviewable. Cf. Edward H. Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539, 555 (1979) ("For all its troubles, the Court is not yet prepared to accept the increasingly cogent argument that the double jeopardy clause should not be read to bar government appeals that rest only on matters of law.").

3. Petitioner has identified no historical basis for treating midtrial acquittals as equivalent to jury verdicts for double-jeopardy purposes. The rise of directed verdicts in criminal cases began in the latter half of the

nineteenth century, see Theodore W. Phillips, Note, *The Motion for Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151, 1152 (1961), and the very premise for granting an acquittal as a matter of law without allowing the case to go to the jury at all would have been irreconcilable with the Founding-era understanding that the jury itself "had the right to judge the law." Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 Ohio St. L.J. 959, 968 (2010).

4. The practice of granting finality to midtrial judicial rulings of evidentiary insufficiency carries substantial costs for the criminal justice system, causing prosecutions to be terminated before verdict, some on plainly erroneous grounds that are unappealable. As discussed above (see pp. 24-25, 30, *supra*), that practice creates a mechanism by which defendants and trial courts may seek to insulate from judicial review legal rulings that would be reviewable if made earlier or later in the same proceeding. The special solicitude for a genuine acquittal entered by a factfinder should not apply when the defendant has voluntarily chosen to terminate his trial prematurely by seeking a legal ruling that forecloses the possibility of a verdict. A ruling of evidentiary sufficiency does not resolve credibility issues or draw inferences from the facts, but instead represents a legal conclusion about the inadequacy of the proof. The defendant has not been deprived of his valued right to present his case to the first factfinder, but has abandoned that right for reasons he deems appropriate. He faces no risk of retrial if the grounds for the midtrial ruling in his favor are correct. But if they turn out to be legally erroneous, he has no valid claim to a windfall, rather than being required to undergo one full trial. See *Arizona* v. *Wash-*

ington, 434 U.S. at 505 (describing the prosecutor's interest in having "one full and fair opportunity to present his evidence to an impartial jury").

CONCLUSION

The judgment of the Supreme Court of Michigan should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

LAMAR EVANS,
Petitioner,

v.

MICHIGAN,
Respondent.

ON WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF *AMICUS CURIAE* FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of approximately 10,000 attorneys, in addition to almost 40,000 affiliate members from all 50 states.* Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files briefs *amicus curiae* in criminal cases in this Court and other courts.

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*. Pursuant to Rule 37.6, counsel for *amicus* curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. After receiving timely notice from *amicus curiae*, the parties consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

This Court has, for over a century, insisted that an acquittal is always a bar to further proceedings for the same offense. This iron-clad rule applies even if the acquittal resulted "from erroneous evidentiary rulings or erroneous interpretations of governing legal principles." *United States v. Scott*, 437 U.S. 82, 98 (1978). An error of law leading to an acquittal "affects the accuracy of that determination, but it does not alter its essential character." *Id.* In 2005, the Court explained that "any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law." *Smith v. Massachusetts*, 543 U.S. 462, 473 (2005). The Court takes this principle so seriously that in 1896 it departed from centuries of English law and the prevailing view in the United States to hold that an acquittal to an indictment so defective that it would not support a conviction was a jeopardy bar to a properly drawn indictment. *United States v. Ball*, 163 U.S. 662 (1896).

The Court has applied the teaching in *Ball* to bar retrials following acquittals even when a legal error led to the acquittal. The only question presented by the instant case is whether there should be an exception to the venerable acquittal principle when the legal error is to require proof of a fact that was not necessary to prove guilt. The State argues that the effect of the trial judge's erroneous construction of the arson statute was to require proof of an element—that the structure be something other than a dwelling house—that the statute did not require. Thus, the

argument goes, this kind of legal error is different from the other kinds of legal errors that have been held not to undermine the finality of an acquittal. The State's argument is clever but ultimately flawed for three reasons.

First, the state offers no plausible reason to treat a legal error that results in requiring an additional fact any differently from any other legal error—for example the *Ball* legal error in drafting the indictment. Just because a distinction is possible does not mean it is a good idea. To be sure, this Court has never explicitly said that an error in construing an offense to require an additional fact has the same former acquittal implications as all other legal errors, but this is not, in itself, a reason to treat it differently.

Second, the distinction is indeterminate and cannot serve as a principle by which to decide cases. Imagine an offense that requires proof that the defendant was armed. The trial judge decides that a defendant who is carrying a box cutter is not armed and, based on this finding, acquits. The court of appeals reverses the trial court's interpretation of the statute, holding that a defendant is armed if carrying a box cutter. Has the trial judge misconstrued the legal reach of the statute, in which case *Ball* forbids a retrial? Or has the trial judge required a fact that the statute does not require—the fact that a defendant be carrying a weapon other than a box cutter—in which case double jeopardy would not prevent a mistrial? A distinction this malleable should not be engrafted onto fundamental basic principles of double jeopardy.

Third, the Court has already settled the "distinct-element" question against the State in at

least three cases. Of particular relevance is *Sanabria v. United States*, 437 U.S. 54 (1978), where the trial judge held that the federal gambling offense required proof of a particular element that was missing from the Government's case. This led the judge to enter an acquittal. The Court of Appeals held that the trial judge was wrong, that the gambling offense could be established by proof of the very element that the Government had alleged and proved. This Court assumed that the Court of Appeals was correct that the trial judge had erroneously required proof of an element that was not necessary but nonetheless held that the acquittal resulting from this legal error was final for purposes of the Double Jeopardy Clause. The only way for the State to win the instant case is for the Court to overrule *Sanabria*. The State has failed to make a case for overruling *Sanabria*.

ARGUMENT

The year 1896 saw a watershed development in the American principle of former acquittal under the Fifth Amendment Double Jeopardy Clause, applicable to the states through the Fourteenth Amendment. In *United States v. Ball*, 163 U.S. 662 (1896), this Court was faced with centuries of English and American precedent holding that an acquittal on a voidable indictment was no bar to another trial for the same offense. The principle was established in *Vaux's Case*, 76 Eng. Rep. 992, decided by the King's Bench in 1591, and embraced by Lord Coke in The Third Part of the Institutes of the Laws of England, 214 (1644). *Ball* cited, 163 U.S. at 666, an impressive list of English authorities supporting this view of former acquittal: John Frederick Archbold, Pleading, Evidence, and Practice in Criminal Cases; Joseph Chitty, A Practical

Treatise on the Criminal Law; Matthew Hale, A History of the Pleas of the Crown; William Hawkins, A Treatise of the Pleas of the Crown; William Russell, A Treatise on Crimes and Misdemeanors; Thomas Starkie, A Treatise on Criminal Pleading. As for American authorities, the Court cited Simon Greenleaf, A Treatise on the Law of Evidence; Joel Prentiss Bishop, Commentaries on the Criminal Law.

Hawkins has the clearest exposition of the voidable indictment principle. In his first edition, published in 1721, Hawkins said that it was "settled at this Day" that when the indictment was so flawed that no good judgment "could have been given upon it," the acquittal could be no bar to a later prosecution because "the Defendant was never in Danger of his Life from the first." 2 Hawkins, ch. 5, § 8. The logic of the common law position was impeccable. If the defendant was never in jeopardy from the first indictment, because it was voidable, how could he be placed twice in jeopardy by a subsequent indictment? But logic does not always prevail.

To prevail, the defendant in *Ball* had to do more than repudiate the logic of the common law. Even as late as 1896, the Court often deferred to English legal principles, particularly ones that had been settled since 1591. To go against that historical tide required a strong belief that the common law view was fundamentally wrong. The Court made clear that this was its view:

> After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it

> proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.

Id. at 669.

Rejecting the premise of the common law view, the Court concluded that a trial upon a "fatally defective" indictment put the defendant in jeopardy as much as a trial on a valid indictment. The voidable indictment could, of course, be avoided by the defendant. But if it was not avoided, the jeopardy was final. As the Court put it, when an acquittal results from a voidable indictment, "the defendant, indeed, will not seek to have it reversed; and the government cannot."

The principle was established: If a defendant submitted the issue of guilt or innocence to a fact-finder, an acquittal by that fact-finder was final. The rule was iron-clad. Over the next hundred years, the Court admitted of no exceptions and, indeed, strengthened the acquittal rule. In *Fong Foo v. United States*, 369 U.S. 141 (1962), the prosecution was in the midst of presenting its case in chief when the trial judge abruptly ordered the jury to return a verdict of acquittal. The Court of Appeals vacated the judgment of acquittal on the ground that the trial court lacked

the power to direct an acquittal before the Government had completed its case. Without questioning the view that the directed verdict was outside the power of the trial judge, the Court nonetheless reversed the lower court and held that the judgment of acquittal was final for double jeopardy purposes. The petitioners "were tried under a valid indictment in a federal court which had jurisdiction over them and over the subject matter. The trial did not terminate prior to the entry of a judgment . . . . [but] terminated with the entry of a final judgment of acquittal as to each petitioner." *Id.* at 143. End of story. No second trial was possible. *See also Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (defendant who demurs at close of prosecution's case in chief seeks determination of guilt or innocence).

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the trial judge granted a Rule 29(c) acquittal after the jury was hopelessly deadlocked. The Court held that no appeal from that judgment was possible because a second trial would put the defendant twice in jeopardy. Quoting from earlier cases, the Court held that the trial judge's acquittal was "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case." *Id.* at 575.

The next year, the Court clarified the scope and meaning of *Martin Linen*. In *United States v. Scott*, 437 U.S. 82 (1978), the Court held that a dismissal on the ground of pre-indictment delay did not bar another trial. The key distinction was that Scott involved a dismissal "without any finding by judge or jury as to his guilt or innocence." *Id.* at 100. The dismissal in *Martin Linen*, on the other hand, was a "factual finding [that] *does* 'necessarily establish the criminal

defendant's lack of culpability' under existing law; the fact that 'the acquittal may result from erroneous evident rulings or erroneous interpretations of governing legal principles,' affects the accuracy of that determination, but it does not alter its essential character." *Id.* at 98, quoting *id.* at 106, Brennan, J., dissenting (citation omitted; emphasis in original).

These principles cover the instant case. As the rest of the brief will detail, Evans was tried under a valid indictment in a court with jurisdiction over him and over the subject matter; his trial terminated with the entry of a final judgment of acquittal on the basis of facts adduced at the trial relating to the general issue of the case. Moreover, *Ball* makes plain that the acquittal rule holds even when the first jeopardy is infected with legal error.

Evans was charged with the Michigan offense of burning "other real property." At the close of the prosecution's proofs, Evans moved for a directed verdict of acquittal on the ground that the State had failed to prove that the structure he had allegedly burned fit the definition of "other real property." Because the structure was a dwelling house, Evans argued, it did not fit the statutory definition.

The trial court agreed with Evans that the crime with which he was charged required that the building be other than a dwelling house. Accordingly, the court entered a written order granting "the Motion for Directed Verdict of Acquittal." App. 72. But the Michigan appellate courts held that the trial judge was wrong in her reading of the arson statute, holding that "other structures" included dwelling houses. *See People v. Evans*, 810 N.W.2d 535 (Mich. 2012); *People*

v. Evans, 794 N.W.2d 848 (Mich. Ct. App. 2010). Because the acquittal was based on a single legal error that resulted in requiring an element that the statute did not require, the Michigan appellate courts also held that the acquittal in the Evans case did not fit the *Ball* rule that acquittals are final despite resulting from a legal error.

What the state courts missed, however, is that the Supreme Court has already faced the "distinct element" situation and held that the erroneous acquittal was final. In *Sanabria v. United States*, 437 U.S. 54 (1978), the indictment alleged illegal numbers betting, based on violation of Mass. Gen. Laws Ann., ch. 271, § 17 (West 1970). At the close of the Government's case, *Sanabria* moved for a judgment of acquittal on the ground that § 17 did not prohibit numbers betting. The district court agreed that § 17 did not prohibit numbers betting. Instead, the judge ruled, the Government should have charged Mass. Gen. Laws Ann., ch. 271, § 7 (West 1970). Because the Government had charged a state law that did not prohibit numbers betting, the district judge excluded all evidence of numbers betting and granted a judgment of acquittal.

The next day, the Government asked the trial court to restore the evidence of numbers betting and to reconsider its acquittal. The judge refused but said that if he had granted the motion to restore, he would have vacated the judgment of acquittal. The Government appealed, and the First Circuit held that the trial judge had erred when it dismissed the numbers "theory" because § 17 *did* prohibit numbers betting. The judge thus erred in excluding evidence of numbers betting and in granting the acquittal.

Accordingly, the First Circuit vacated the acquittal.

The Supreme Court reversed. The Government argued that the trial judge had, in effect, dismissed the numbers part of the indictment and that this dismissal could be appealed. The Supreme Court disagreed:

> We must assume that the trial court's interpretation of the indictment was erroneous. But not every erroneous interpretation of an indictment for purposes of deciding what evidence is admissible can be regarded as a "dismissal." Here the District Court did not find that the count failed to charge a necessary element of the offense; rather, it found the indictment's description of the offense too narrow to warrant the admission of certain evidence. To this extent, we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error.

Id. at 68-69 (footnote and citations omitted).

To put *Sanabria* in the "distinct element" terms used by the State in the instant case, the district judge required the Government to prove an element, § 7, that it did not have to prove. The Court nonetheless held that the resulting acquittal could not be appealed. Though the State's "distinct element" argument was

apparently not presented to the *Sanabria* Court, the Court's holding and analysis excludes the argument. *Sanabria* said that when "an erroneous evidentiary ruling" leads "to an acquittal for insufficient evidence," the Double Jeopardy Clause forbids a second trial. That is precisely what happened in Evans's case.

To be sure, on at least some understandings of stare decisis, the Court's failure expressly to address the "distinct-element" argument in *Sanabria* leaves an opening to create an exception to its holding. But creating an exception to an acquittal rule that has been ironclad since 1896 requires a strong justification. The State has failed to offer even a plausible justification, let along one strong enough to modify a rule that has been settled for over a century.

Consider the equities. Evans faced conviction in his first trial. He did not seek to avoid the trial through a motion for mistrial or dismissal on grounds unrelated to guilt or innocence. The *jury* did not reach the merits of the charge against him but only because *the judge made a legal error in construing the charge.* If one knew nothing about double jeopardy but decided the case on basic fairness, Evans should not have to face another determination of guilt or innocence since he did not avoid the first determination. The error was not his; he merely asked the judge to declare his lack of guilt, which the judge did. As the Court put the equities in 1957:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,

> expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

If the State can somehow persuade this Court that the equities favor giving the State another chance to prove guilt in Evans's case, it faces a second hurdle. Before creating an exception to the venerable acquittal rule, this Court must be persuaded that the rule the State urges is a sound one that will in practice easily separate cases into categories. Here, too, the State fails, as three examples will demonstrate.

In *Arizona v. Rumsey*, 467 U.S. 203 (1984), the trial judge construed the relevant aggravating circumstance in a death sentencing phase as applying only to "a contract-type killing situation and not to a robbery, burglary, etc." Based on this interpretation, the trial judge "acquitted" Rumsey of the death penalty. After the state courts held that the judge's interpretation of the death penalty statute was erroneous, the State sought to re-litigate the sentence. This Court ruled that the Double Jeopardy Clause prohibited a second sentencing hearing.

How *Rumsey* would be decided under the State's "distinct-element" test is impossible to predict. If the trial judge's interpretation is a general legal error in construing the death penalty statute, then *Rumsey* is covered by *Ball*, and the sentence could not be re-litigated. It seems more likely, however, that the judge's error amounted to adding an element to the

sentencing scheme—that the killing be a contract killing. On this interpretation, the State should have won *Rumsey*.

The second example is *Smith v. Massachusetts*, 543 U.S. 462 (2005), where the trial judge granted a directed verdict of acquittal because of a lack of evidence that the weapon the defendant possessed had a barrel length of less than 16 inches. After the defense had completed its case, the prosecution presented a state law precedent that persuaded the trial judge that the victim's testimony about the kind of gun indirectly demonstrated that the barrel length was less than 16 inches. The trial judge sought to overrule her directed verdict of acquittal based on this development. The Court held that the trial judge's ruling was an acquittal precluding further proceedings on that count even if it was based on an error about the law. *Id.* at 473. Did the trial judge simply misconstrue the 16-inch element of the offense or did she in effect add a requirement that the length must be proved only by direct testimony? Under the State's proposed "distinct-element" test, the double jeopardy result depends on which characterization a court chooses.

The third example is Evans's case itself. The statute required proof of burning "other buildings." The trial court's error in agreeing that this excluded dwelling houses can be understood, as the Michigan appellate courts did, as adding an element that the statute did not require—that the building not be a dwelling house. But why is it not just as plausible to say that the trial court simply got the meaning of "other buildings" wrong, that she just made a general legal error in her interpretation of "other buildings"?

Indeed, describing the error in this case as one of misinterpretation is less strained than imaging that the judge was adding a new element to the offense.

A standard that can be this easily manipulated is not a sound idea, as a policy matter, if the Court were writing on a blank slate when considering the State's proposed "distinct element" test. But this Court is not writing on a blank slate. In *Ball*, the Court rejected centuries of English precedent in 1896 to create a robust protection of acquittals. It has steadfastly maintained that robust protection, and for good reason: "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." *Green*, 355 U.S. at 187. Lamar Evans submitted his guilt or innocence once in 2009. The State should abide by the result of that trial.

CONCLUSION

"It is a short point," Justice Holmes said for the Court in rejecting the Government's attempt to multiply penalties for the same false entry in bank records. *United States v. Adams*, 281 U.S. 202, 203 (1930). The argument presented here is also a "short point." Acquittals rendered after a defendant has submitted his guilt or innocence to the fact-finder are final, and this principle holds even if the fact-finder is the judge and even if the judge has made a legal error that leads to the acquittal. The State seeks to avoid this categorical bar by invoking a "distinct-element" exception—if the error was to add a new element to the offense, the acquittal is no longer final. *Sanabria* implicitly rejected the State's "distinct-element" exception when it held that the judge's mistake in requiring proof of one state law violation rather than another did not undermine the resulting acquittal. The State in the instant case fails to show the kind of strong justification it would need to re-open the "distinct element" issue seemingly settled in *Sanabria*. Indeed, the State fails to show that the "distinct-element" exception is a sound idea in policy or practice even if the Court were deciding the issue as a matter of first impression.

Lamar Evans submitted the question of his guilt or innocence to a judge and jury in Michigan in 2009. The judge decided that the offense required a fact that the State had failed to prove and, accordingly, entered an acquittal based on insufficient evidence. Whether

the judge was right or wrong about what the State had to prove, the acquittal should be final.

Respectfully submitted,

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